TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 227.

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JOHN S. JOHNSON, PHILIP DORSHEIMER, AND OTIS F. PRESBREY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

JOHN S. JOHNSON, PHILIP DORSHEIMER, and Otis F. Presbrey
vs.
THE UNITED STATES.

To the honorable the Court of Claims:

The petition of Philip Dorsheimer, Otis F. Presbrey, and John S. Johnson, respectfully showeth to this honorable Court:

That each of your petitioners is a citizen of the United States, and resides in the city of Buffalo, Erie county, and State of New York.

That your petitioners are jointly and equally interested in, and are the sole owners of, the claim hereinafter set forth, and that no other person or persons are interested therein.

That there were instituted, at divers days, from about the 15th of April to the 15th of May, 1865, in the district court of the United States for the southern district of New York, by the United States, through its district attorney, divers proceedings in rem, against about nineteen hundred barrels of distilled spirits, which were seized and held in said proceedings as having been manufactured by, and belonging to, Joseph A. Rhomberg. Said proceedings were instituted and prosecuted for the forfeiture of said 1,900 barrels of distilled spirits for an evasion of the United States revenue laws, especially the act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the
2 public debt, and for other purposes," approved June 30, 1864, and other acts of Congress amendatory thereof.

And said proceedings in rem for forfeiture were based upon and alleged facts substantially as follows: That said distilled spirits so seized had been manufactured at Dubuque, in the State of Iowa, by Joseph A. Rhomberg, between the first of January and the first of April, 1865, and that said Rhomberg, during said period, was a manufacturer at said Dubuque of large quantities of distilled spirits, including said 1,900 barrels, and had fraudulently failed to comply with the provisions of the acts of Congress upon the subject of taxes and revenue relating thereto, and especially with the said act of the 30th of June, 1864, and the 53d, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62d, and 63d sections thereof.

And that the said Rhomberg did make many, and large, false, and fraudulent returns or statements of the amount of distilled spirits by him manufactured, and did fraudulently withhold large sums of money of estimated duties to about the amount of $195,000, that would have been due to the United States for taxes on distilled spirits manufactured by him, had correct returns thereof been made by said manufacturer during said period, from the 1st of January to the 1st of April, 1865.

And that by reason of said fraudulent conduct of said manufacturer, and his evasion of said acts of Congress, and failure to make

correct returns of the property so manufactured by him, and his defrauding the government of revenue due under said laws, under sections 48 and 68 of said act of 30th of June, 1864, the property therein enumerated belonging to said Rhomberg, and especially said 1,900 barrels of distilled spirits so seized, did become, and were, forfeited.

That, prior to the commencement of said proceedings in rem, by the United States for the forfeiture of said 1,900 hundred barrels of distilled spirits, at divers times, between the 15th of April,
3 1865, and the 15th of May, 1865, they were seized by one of your petitioners, Philip Dorsheimer, collector of internal revenue for the 30th district of New York, which seizures were made at the city of New York, and immediately thereafter information against the said property was lodged by said Philip Dorsheimer with the United States district attorney, in pursuance to which information, and in support of which seizure, proceedings in rem for the forfeiture of said property were instituted.

And that about the 19th day of May, 1865, in the district court of the United States for the northern district of New York, by the United States, through its district attorney, there were instituted certain proceedings in rem against eleven barrels of distilled spirits, which were also seized and held in said proceedings as having been manufactured by, and belonging to, said Joseph A. Rhomberg, at Dubuque, Iowa, as aforesaid, between the 1st of January and the 1st of April, 1865.

And said proceedings were instituted and prosecuted for the forfeiture of said property for the evasion of the United States revenue laws, especially of said act of Congress of June 30th, 1864, and the same sections hereinbefore specified, being sections 53 to 63, both included; and said proceedings were based upon, and substantially alleged as facts for the forfeiture of said eleven barrels of distilled spirits, the same facts as hereinbefore stated for the forfeiture of said nineteen hundred barrels, as constituting a fraudulent evasion of said acts of Congress by said manufacturer, Joseph A. Rhomberg, and working a forfeiture of said eleven barrels of spirits under said 48th and 68th sections of said act of 30th of June, 1864.

That, prior to the commencement of these proceedings for the forfeiture of said eleven barrels, and about the 3d of May, 1865, the same were seized by said Philip Dorsheimer, as collector as aforesaid, at the city of Buffalo, State of New York. After which seizure, upon information lodged with the United States district
4 attorney by said Philip Dorsheimer, said proceedings for the forfeiture thereof were instituted.

And that, on or about the 27th of May, 1865, there was instituted in the district court of the United States for the northern district of Illinois, at Chicago, by the United States, through its district attorney, certain proceedings in rem against forty-four barrels of distilled spirits, which were also seized and held in said proceedings as having been manufactured by, and belonging to, said Joseph A. Rhomberg, at Dubuque, State of Iowa, as aforesaid, between the 1st

of January and the 1st of April, 1865; and said proceedings were instituted and prosecuted for the forfeiture of the said property for an evasion of the revenue laws of the United States, especially of said act of Congress of 30th of June, 1864, and the same sections hereinbefore specified, from 53 to 63; and said proceedings were based upon, as facts substantially alleged for the forfeiture of the said forty-four barrels, the same facts as hereinbefore stated for the forfeiture of the said nineteen hundred barrels, as constituting a fraudulent evasion of said acts of Congress by said Joseph A. Rhomberg, and working a forfeiture of said forty-four barrels, under said 48th and 68th sections of said act of 30th of June, 1864.

And that, about the 28th of April, 1865, there was instituted in the district court of the United States for the district of Iowa, by the United States, through its district attorney, certain proceedings in rem against a large quantity of property, which was also seized and held as the property of said Joseph A. Rhomberg, and was in his possession at Dubuque, aforesaid, in the State of Iowa, consisting, among other things, of the distillery of said Rhomberg and its appurtenances, about 50,000 bushels of corn; 2,000 bushels of wheat; 2,000 bushels of rye; 8,000 bushels of oats; 8,000 bushels of malt; 15 bales of hops; 300 cords of wood; 100 tons of coal; 7 wagons; 11 horses; 6,000 staves; 580 whiskey barrels; 200 barrels of high wines; 100,000 feet of lumber, and other property; said property having been seized, and said proceedings in rem against the same instituted and prosecuted for the forfeiture thereof for an evasion of the revenue laws of the United States, and especially of said act of 30th of June, 1864, and the same sections as hereinbefore specified, from 53 to 63, both included; and said proceedings were based upon, and substantially alleged as facts for the forfeiture of the property so seized therein, the same facts as hereinbefore stated for the forfeiture of the said 1,900 barrels of distilled spirits, as constituting a fraudulent evasion of said acts of Congress by said Joseph A. Rhomberg, and working a forfeiture of said property, under sections 48 and 68 of said act of 30th of June, 1864.

And your petitioners allege that they were the first to discover and ascertain that said Joseph A. Rhomberg, at his said distillery, in the city of Dubuque, was engaged in the fraudulent practices hereinbefore stated, during the period extending from January 1st to April 1st, 1865, and that on or about the 10th of April, 1865, they made the discovery thereof, and thereafter, at much expense and labor, prosecuted investigations in relation thereto, associating themselves together for that purpose on equal terms, both as to expenses and profits to be derived by them from the successful prosecution of said investigations, and that said Rhomberg was the only person professing to represent the firm of Rhomberg & Company.

And your petitioners further allege that all of the seizures aforesaid were made, and all of the proceedings aforesaid, in rem, by the United States, for the forfeiture of said property, were instituted upon information given by your petitioners, and that your petition-

ers did first inform the officers making such seizures, and instituting the said proceedings for forfeiture of the cause, matter, or thing whereby the forfeiture of the property aforesaid was incurred.

6 That your petitioners, by virtue of the forty-first section, and one hundred and seventy-ninth section of said act of 30th of June, 1864, thus became and were entitled to the one moiety of the forfeitures aforesaid; that it is provided in the forty-first section of said act that "all fines, penalties, and forfeitures, which may be incurred or imposed by virtue of this act, shall be sued for and recovered in the name of the United States, and where not otherwise an differently provided for, one moiety thereof shall be to the use of the United States, and the other moiety thereof to the use of the person, to be ascertained by the judgment of the court, who shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred."

That the property seized as aforesaid, and for the forfeiture of which said proceedings were instituted, was of the value of three hundred and fifty thousand dollars, and that had said proceedings of forfeiture been prosecuted to trial and judgment, all of said property would have been forfeited to the uses as above stated; that the proof of guilt of said Rhomberg, who was the sole owner of said property, was plain, and the facts above stated constituting his guilt, were not denied by him, but were confessed.

And your petitioners were opposed to the dismissal of the proceedings, in rem, hereinafter stated, and always believed and urged that the parties who advanced money, as below stated, were, in law, parties to the evasion of the revenue laws aforesaid.

After the institution of said proceedings in rem, in the month of May, 1865, Messrs. Sturges Sons, who were bankers at Chicago, and the Dubuque Branch Bank, claimed to have made advances upon the spirits seized at Chicago, Buffalo, and New York. That they had acted in ignorance of any frauds perpetrated by Rhomberg, and they asked for a release of said spirits, pending the consideration of the matters involved by the Commissioner of Internal Revenue, to whom they applied for a compromise of the entire matters and liabilities involved.

7 The Commissioner of Internal Revenue entertained the proposition made on the part of Sturges Sons and the bank for such compromise, and commenced the investigation of the facts and matters involved, took testimony of the advances of money by said parties, the frauds committed by Rhomberg, the question of the complicity of Sturges Sons therein, and as to whether there was such business connection between Rhomberg and the parties advancing money to him as to involve them in the legal effect of his guilty acts.

Pending such investigation, the Commissioner of the Internal Revenue, Mr. Lewis, ordered a part of the property seized, namely, the spirits seized at Chicago, Buffalo, and New York, but not the distillery and other property seized at Dubuque, to be handed over to said Sturges Sons, and said proceedings for forfeiture against the spirits released to be discontinued, taking at the time from Sturges Sons and the

bank, by way of compromise, a bond executed by them in the penal amount of $275,000, with condition as follows: Reciting the seizures aforesaid of said distillery and other property at Dubuque, and spirits at Buffalo, Chicago, and New York, estimating the value thereof at $272,000, and the advances of Sturges Sons, on said spirits, of $280,000, it provided:

That, if it should be determined by the Commissioner of Internal Revenue that the said spirits so advanced upon are not subject to the lien of the government for revenue duties as against the advances made by the said firm, or if the obligors shall pay such sum of money as the Commissioner should determine to be due the government for said property seized, then the obligation to be void, it being understood that the obligors are not liable under the bond for any penalty which the government may assess against Rhomberg & Company, but only shall be liable for the actual amount of duties found to be unpaid, together with proper costs and charges attending the investigation of the case and seizure of the property.

8 After making this arrangement as to part of the property seized, the Commissioner of the Internal Revenue, Lewis, through the officers holding the distillery and appurtenances at Dubuque, caused said distillery buisiness to be carried on to convert the grain on hand, which would otherwise have spoiled, into spirits, and this produced 75,000 gallons of spirits, worth $150,000; and during said operation received, for expenses of running the distillery, of Sturges Sons, $54,814.

On the 26th of May, 1865, a proposition was made to Commissioner Lewis, in behalf of Sturges Sons and the bank and Rhomberg & Co., to compromise the case upon the payment of $100,000 as taxes, $5,000 as penalties, the government to release all the property seized; which proposion was rejected on the 1st of June, 1865.

On the 26th of June, 1865, Sturges Sons and the Dubuque Branch Bank made a further offer, by way of compromise, for the immediate and final settlement of the questions pending. They proposed that they would purchase of the government, the distillery and contents, and the property of every kind seized and held for the default of Rhomberg, such property to be delivered by the government to the parties free from all claim of the United States for taxes, penalties, or forfeitures; in consideration of which they offered to pay the residue of the amount estimated as unpaid taxes, viz: $161,363; and an amount not to exceed $10,000 for services of informers, which, including the $33,906, paid by Sturges Sons immediately after the seizure of the property in New York, made the gross amount of $205,309; which proposition is in the words and figures as follows:

"WASHINGTON, *June* 26, 1865.

"SIR: In view of the delay in the decision of our case before you resulting, as we are informed, from a necessary investigation of certain legal questions, we beg respectfully to offer, as terms of

9 immediate and final settlement, the following compromise: The United States to convey to us the distillery and contents; also,

property of every kind seized or held as security for the default of J. A. Rhomberg & Co., and to assign to us the bond of Graves & Greenwall, sureties for Rhomberg & Co., and to cancel our bond for submission of the case to the Commissioner of Internal Revenue, and to deliver the said property to us free from all claims of the United States for taxes, penalties, or forfeitures; or, in case the Commissioner shall think that the United States cannot sell this property at private sale, we agree that in case it be sold at public sale as soon as the law will permit, then the property shall bring on such sale $161,363, and any further sum, not to exceed $10,000, that may be adjudged by yourself to be properly due to the informers for services. In case we become the purchasers, we propose to pay $50,000 cash, $50,000 in ninety days, and the balance in six months, on such security as shall be approved by the Secretary of the Treasury. In case we become purchasers of only a part of the property sold, we will pay at the same rate as above stated for the part we purchase. Whatever the property may bring at such sale to belong to Sturges Sons, after paying the government the tax and additional sum to be paid the informers.

"SOLOMON STURGES SONS,
"THE DUBUQUE BRANCH BANK,
"By WIRT DEXTER, *their Attorney.*

"Hon. JOSEPH A. LEWIS,
"*Commissioner of Internal Revenue.*"

Commissioner Lewis did not act upon this proposition, nor did he make any compromise of the matter in controversy with Sturges Sons and the other claimants, but he left the matter in an unfinished condition to his successor; but, having drafted a report, dated on the 30th of June, 1865, the day of the expiration of his term of office, to the Secretary of the Treasury, on the matter, in which he gave as his decision as follows: That there remained $161,156 deficiency of taxes at that time; that Sturges Sons had advanced $258,600, which included $33,946 paid at Dubuque immediately after the seizure of the property at New York; that for this amount they had a lien only on the spirits, upon which their advances had been made, but that it was subject to the lien of the United States for its unpaid taxes; but that the government, having a lien on three other descriptions of property, must first exhaust its remedy against these three before it could come against this fourth class, on which both parties had a lien; that, therefore, by the common rule of equity, the government must first exhaust the property on which it alone had claims, and if there was after that any amount remaining unpaid to the government, for that it could call upon Sturges Sons, under said bond of 22d May, 1865. Pending the proceedings, some other property had been distrained upon under warrant issued for the taxes, which he held should be first sold.

Commissioner Lewis having thus failed to make any settlement of the matter, on the 3d of July, 1865, his successor, Commissioner Orton, made a report on the subject to the Secretary of the Treasury, in which he transmits the draft of the report signed by his predeces-

sor, Commissioner Lewis, in which he assumes the facts stated by him to be correct, but dissents from the conclusions of law expressed by Mr. Lewis, holding that the proceedings against the property released were not for taxes, but to enforce the forfeiture thereof on account of the fraudulent practices of the manufacturers, which, being proved or admitted, gave the United States the right to forfeit the same wherever found; that the right to forfeit the property is independent of its liability to be distrained for taxes; that the government had no lien for taxes on the property seized for forfeiture; that Sturges Sons were not liable to the United States for taxes, and so the bond they gave for taxes was void; and, as it was the
11 consideration for the delivery to them of the spirits seized, they got them without consideration, and the transaction as to the release of property and acceptance of the bond was unauthorized by law, and of no binding effect on the government; and, consequently, there had been no waiver of forfeiture by the United States.

The posture of affairs being thus, the distillery and other property originally seized in rem for forfeiture at Dubuque, still continuing so seized, the addition thereto of $150,000 worth of spirits, distilled during said seizure, and the decision of the 3d of July of Commissioner Orton, that the forfeiture of the nineteen hundred and fifty-five barrels of liquor which had been turned over to Sturges Sons could still be enforced thereafter, and on the 26th July, 1865, Sturges Sons and said bank made a further application to Commissioner Orton for compromise, that they should pay for all the property seized at Dubuque (excepting wines made since the seizure) $70,000, receiving from the government on account of said sum a credit of $54,814, being the estimated cost of material and money used in making the wines since the seizure; all wines and alcohol not heretofore released to be so; their bond to be cancelled, and Rhomberg's bond to be assigned to them; the wines manufactured since the seizure to be the property of the government.

Commissioner Orton reports the value of the wines to be two dollars a gallon—75,000 gallons—making $150,000 the value of the wines, which added to the balance of cash offered, $15,186, makes the whole offer of compromise at that time $165,186, to which said sum of $33,946 so previously paid by Sturges Sons, makes a total amount of $199,132.

The Secretary of the Treasury thereupon, acting under section 44 of said act of Congress, compromised with Sturges Sons and the said bank, as follows:

He delivered and relinquished to them the distillery at Dubuque, originally seized and until then held under said proceedings in
12 rem for forfeiture, and the appurtenances, and also the product of said distillery and other property seized for forfeiture, namely: said seventy-five thousand gallons of liquor, worth $150,000, free of tax, and also the moneys received at Dubuque, the proceeds of sale of cattle also seized in rem as aforesaid, and also the liquors seized at Chicago, Buffalo, and New York, with the claim of the United States for forfeiture.

The government, in addition thereto, surrendered said bond of 22d May, 1865, and assigned to Sturges Sons a bond given by Rhomberg & Co. to the United States, in consideration for which the government received an aggregate amount of money equal to two hundred and twenty thousand one hundred and two dollars, ($220,102,) in addition to the costs and charges accruing to the revenue officers for their seizure, which amount the Secretary of the Treasury stated to be constituted as follows: One hundred and ninety-five thousand one hundred and two dollars of estimated deficiency of taxes against said Rhomberg, and paid after the seizure of said property, to wit: $33,946 paid in Dubuque, soon after the said seizure in New York, by Sturges Sons, on confession by Rhomberg that that amount of taxes had been withheld by him, and $161,156 further deficiency of estimated taxes, and $25,000 in lieu of penalties and forfeitures incurred; and also three thousand and twenty-three dollars fourteen cents was subsequently received by the government for interest on deferred payment of a portion of said aggregate amount.

Before the decision of the Commissioner of the Internal Revenue and the Secretary of the Treasury, and while they held this matter under advisement, your petitioners protested against any settlement of the case that should be upon the basis that made a distinction between the share to be paid to the use of the government and of the informers; they pressed upon the Secretary of the Treasury, in a communication that they submitted to him, that there had not
13 been any release of the forfeiture incurred, and that the money received by the government of Sturges Sons, being in compromise of the suits for forfeiture, and the subsequent proceedings engrafted thereon and springing therefrom, had its root and origin in the suits for forfeiture, and did not proceed from any lawful assessment of, and collection of taxes; and that as the money was paid by Sturges & Company, who were rather purchasers of the property seized and not parties liable originally for the taxes, the money received was in fact as so much reserved out of the forfeiture, and not so much paid on property on which the taxes had been legally assessed.

Urging these views upon the Secretary of the Treasury, your petitioner asked that in such reservation out of the forfeiture that he should keep in view the 41st and 179th sections of said act of 30th June, 1864, and recognize the rights of your petitioners to an equal share with the government in the amount so to be reserved by compromise with said Sturges & Company out of the forfeitures sued for and originally claimed.

But the Secretary of the Treasury, although he acted under said 44th section of said act of 30th June, 1864, as stated by him in his report of this matter to the United States Senate, on the 5th of February, 1866, contained in Executive document No. 21, of the Senate, in the 39th Congress, which 44th section simply authorized a compromise of suits relating to internal revenue, while admitting that your petitioners are, as they claim to be, the persons who first informed of the cause, matter, and thing by which the property

above mentioned was seized for forfeiture, has refused to pay your petitioners a moiety of the amount of money paid by Sturges & Company for the compromise and settlement of said matters in controversy as aforesaid, and has been willing to pay to them only the moiety of the sum of twenty-five thousand dollars, part of the
14 money so reserved, as aforesaid, out of said forfeiture, after deducting all expenses incurred by the government in this matter.

That your petitioners are all and each of them citizens of the United States, and that each of them has, at all times, borne true allegiance to the government of the United States, and that neither of them has, in any way, voluntarily aided, abetted, or given encourgement to the rebellion against the government. Therefore your petitioners pray, that by the judgment of this honorable court they may be declared entitled to recover the moiety of the amount of money received by the government of the United States, as hereinbefore stated and shown, namely: the one-half of two hundred and twenty thousand one hundred and two dollars, and to such other relief as they may be entitled to.

M. BLAIR,
F. A. DICK,
Solicitors for Claimants.

STATE OF NEW YORK, *Northern district of New York, Erie county ss:*

Philip Dorsheimer, Otis F. Presbrey, and John S. Johnson, being each severally duly sworn according to law, depose, and each for himself says, that he has read the foregoing petition, and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge and belief; that no assignment or transfer of said claim in said petition set forth, or any part thereof, or any interest therein has been made, except as in said petition stated, and that the said claimants are justly entitled to the
15 amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts facts stated in said petition are true.

PHILIP DORSHEIMER.
OTIS F. PRESBREY.
JOHN S. JOHNSON.

Sworn before me, this 18th day of October, 1866.
DENNIS BURTON,
U. S. Commissioner.

Filed in the Court of Claims, Oct. 27th, 1866.]

16 In the United States Court of Claims, December term, A. D. 1866.

PHILIP DORSHEIMER, OTIS F. PRESBURY, and JOHN S. JOHNSON,
vs.
THE UNITED STATES.

And the said defendant, by John J. Weed, its solicitor, comes and says that the said claimant's petition, and the matters and things therein stated and set forth, are not sufficient in law for the said claimants to have or maintain their aforesaid action thereon against the said defendant.

Wherefore the said defendant prays judgment, &c.

JOHN J. WEED,
Assistant Solicitor for the United States.

Filed in the Court of Claims, November 1st, 1866.

17 In the Court of Claims.

PHILIP DORSHEIMER, *et al*,
vs.
UNITED STATES.

And now, to wit, January 28, 1867, the court upon due consideration of the premises, do sustain the said demurrer, and do order, adjudge, and decree that the said petition be dismissed.

By the Court.

18 In the Court of Claims.

PHILIP DORSHEIMER, *et al.*
vs.
UNITED STATES.

FEB. 26TH, 1867.

The undersigned attorneys of record, for the above-named petitioners, respectfully pray the court to grant an appeal to the Supreme Court of the United States on said case, and allege that the court erred in sustaining the demurrer to the petition, and in giving final judgment dismissing said petition.

M. BLAIR,
F. A. DICK,
Attorneys for Petitioners.

At a Court of Claims held at the capitol in the city of Washington, on the 26th day of February, A. D. 1867.

PHILIP DORSHEIMER, *et al*,
vs.
UNITED STATES.

The aboved entitled cause was submitted on a petition of appeal,

by Messrs. Blair & Dick, counsel for the claimants, and said appeal was allowed by the court, and ordered to be certified as prayed for.

By the Court.

19 In the Court of Claims.

PHILIP DORSHEIMER, *et al*,
vs.
THE UNITED STATES.

I, Sam'l H. Huntington, chief clerk of the Court of the Claims, do hereby certify that the foregoing is a true transcript of the pleadings and of the final judgment or decree of the Court of Claims in the above entitled cause, and of the petition, by the claimants, for the allowance of an appeal in said cause, and of the record of the action of the court thereon allowing the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 15th day of March, A. D. 1867.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

[SEAL.]
Attest:

JOS. CASEY,
Ch. J. C't of Claims.

SUPREME COURT OF THE UNITED STATES.

No. 90.

DECEMBER TERM, 1868.

JOHN S. JOHNSON ET AL., APPELLANTS,

vs.

THE UNITED STATES.

Brief for the appellee.

This case comes here from the Court of Claims, by appeal from a decision sustaining a general demurrer to the appellants' petition.

That petition alleged, that, between Jan. 1st and April 1st, 1865, one Rhomberg, a distiller, at Dubuque, violated the laws relating to internal revenue, (*inter alia,*) by making false returns and fraudulently withholding taxes to about the amount of $195,000, which acts involved, as a legal consequence, the liability to forfeiture, or as they say, the actual forfeiture of certain of his property. Upon information furnished by the appellants, the petition alleges, such property was seized, and afterwards proceedings for its forfeiture were instituted by the respective district attorneys in the following districts: southern and northern New York, northern Illinois and Iowa, where the seizures were made.

Beside this property, there also appear in the case 75,000 gallons of high wines, manufactured in the distillery while the distillery was in the custody of the law, under seizure, which was conceded to be the property of the government, valued at $150,000, on which the distiller claimed to be allowed $54,814 for the value of the materials, &c.

After the seizure third parties intervened, most prominently Sturges Sons of Chicago, claiming that they had innocently made advances on property thus seized; and they paid to the United States $33,946, "*on confession by Rhomberg that that amount of taxes had been withheld by him.*" (P. 8.)

Then followed offers of compromise from Sturges Sons, for themselves and other interests, and reports of the Commissioner of Internal Revenue thereon.

May 26, 1865, they offered to pay $100,000 taxes and $5,000 penalties. (P. 5.)

June 26, 1865, they offered to purchase all the property seized, paying (including $33,946 before paid) as unpaid taxes $195,309, and $10,000 for informers. (P. 5.)

Commissioner Lewis, on the eve of leaving the office, June 30, 1865, drafted a report, stating a still remaining deficiency (after payment of $33,946) of taxes to the amount of $161,156; and his successor, Commissioner Orton, adopted his statement of facts. (Pp. 6 and 7.)

Thereafter, on July 26, 1865, Sturges Sons made an offer to pay for the property seized $70,000, namely, by the sum claimed as their due for materials of the wines distilled by the government, $54,814, and a cash balance of $15,186, all seizures to be released, while *the wines manufactured since the seizure were to be the property of the government.* (P. 7.)

Commissioner Orton reported these wines worth $150,000, which added to the cash balance offered ($15,186) makes the total offer in compromise at that time $165,186, and in all $199,132.

The petition then goes on to state that the Secretary delivered to Sturges Sons et al. all the property under seizure for forfeiture, also moneys received as proceeds of cattle sold at Dubuque; and also the wines manufactured after the seizure, with the claim of the U. S. for forfeiture. (P. 7.)

The government received, the petition states, in all $220,102, "which amount the Secretary of the Treasury stated to be constituted as follows:"

Deficiency of taxes, paid before	$33,946	
" now	161,156	
		$195,102
In lieu of penalties and forfeitures		25,000
		$220,102

And a further sum for interest of $3,023 14. (P. 8.)

Of the sum stated as in lieu of penalties and forfeitures, $25,000' the Secretary never refused, but was always willing to pay to the appellants a moiety, (p. 9;) and therefore they can have no judgment for so much.

Their claim, however, being for a moiety of the whole sum, $220,102, this brief denies their right to any portion of the residue over $25,000, namely $195,102.

Section 41, and prior to March 3, 1865, section 179 of the act of June 30, 1864, vol. 13, p. 239 and 305, furnished no foundation to the appellant's claim; each operating only in cases where the penalty has been judicially ascertained, as here had not been done.

Furthermore, section 179, as originally enacted, provided a moiety for the informer only if he was "a collector or deputy collector,"

which two of the petitioners were not. This qualification, however, was, March 3, 1865, vol. 13, p. 483, stricken out, and the section further amended by adding the following after the words "use of the United States:"

"Where any penalty is paid without suit, or before judgment, and a moiety of the same is claimed by any person, as informer, the Secretary of the Treasury, on application to him, under such regulations as he shall prescribe, shall determine whether any claimant is entitled to such moiety, and to whom the same shall be paid."

Under this provision the informer is entitled to a moiety only when "*penalty is paid* without suit," (as could not be here,) "or before judgment," (which would be possible in the present case.)

The only question, then, in the case is, whether the sum of $195,102., now under consideration, was penalty paid into the Treasury of the United States.

The Secretary of the Treasury who, on the part of the United States, negotiated this payment, states that it was not received as penalty. And beyond the statement of this officer, in relation to this matter, it is submitted that this court will make no inquiry. That statement will be deemed sufficient to sustain the demurrer to the petition in this court as in the court below.

But if this court look into the other statements of the petition to ascertain whether or not this statement is correct, those other statements will be found strongly to corroborate this representation of the Secretary.

One of the earliest statements in the petition is of a deficiency of taxes of $195,000, (p. 1,) which statement is confirmed by both Commissioners of Internal Revenue in reporting upon the case. (Pp. 6 and 7.) $33,946 was paid soon after the seizure upon a confession of so much deficiency of taxes. (P. 8.) The offer of penalty never passed $10,000, (p. 5,) while that for taxes rose from $100,000 to $199,132. (P. 7.) The bond given by Sturges Sons was to secure payment of unpaid taxes. (P. 5.)

To these statements of fact it is no sufficient answer to say even that the action of the Secretary was not authorized by law. Whether brought about lawfully or otherwise, the result, namely, the non-payment of the sum of $195,102, or of any part thereof, as penalty, takes away the foundation of this claim. For this is a claim not for damages, because the Secretary of the Treasury has unlawfully prevented a moiety from accruing to the appellants, but for a moiety which they allege did accrue. Nor does it avail the appellants that what was received ought to have been received as penalty. It is enough in support of the demurrer to show that, in fact, it was not paid and received as penalty.

Furthermore, it cannot be shown that the act of the Treasury Department in discontinuing these proceedings upon full payment of the taxes withheld, and of $25,000 in lieu of fines and penalties, was unlawful. Such action was entirely within the scope of authority conferred by the 44th section of the act of 1864, (vol. 13, p. 40,) upon the Commissioner of Internal Revenue, subject to regulations to be

prescribed by the Secretary of the Treasury, to compromise all "suits relating to internal revenue."

But the petition shows no action of the Treasury Department in this respect of which the appellants have legal cause of complaint. True, it asserts that the Secretary delivered and relinquished the property seized. But there the petition asserts what the petition shows not to be true. For the petition had previously, with great particularity, shown the seized property to be in the custody of the federal courts, whose officers are not bound in duty to obey any unlawful order of the Secretary of the Treasury. If the release made by them was unlawful, they must themselves answer in damages to all parties injured thereby. Further, if the Secretary could not lawfully remit on compromise, then the law officers may still prosecute, for all that appears to the contrary in the petition.

The earlier decisions in cases of seaport revenue do not affect this case, and are not discussed. But further none of those arose in a suit discontinued "before judgment."

Thus far the argument has admitted the appellants to the full benefits of the amendment of March 3, 1865, to section 179 of the act of June 30, 1864. They are, however, not within the scope of that amendment. The petition sets forth a forfeiting offence committed prior to the date of the amendment; and section 16 of the amendatory act makes the provisions of the former act govern the collection of all penalties incurred thereunder. (Vol. 13, p. 484.)

W. M. EVARTS,
Attorney General
for the United States.

Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN S. JOHNSON, PHILIP DORSHEIMER, AND OTIS F. PRESBREY

VS.

THE UNITED STATES.

M. BLAIR,
F. A. DICK,
Of Counsel for the Plaintiffs in Error.

J. L. Pearson, Printer, corner 9th and D streets.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN S. JOHNSON, PHILIP DORSHEIMER, AND OTIS F. PRESBREY

vs.

THE UNITED STATES.

STATEMENT.

This action is to recover of the United States the one-half of a sum of money which the government received as the avails of a compromise made by it with certain persons, designated as Sturges & Sons, and the Dubuque Branch Bank of prosecutions against property, which had belonged to distillers known as Rhomberg & Co.

These distillers, between the 1st of January and 1st of April, 1865, while engaged in manufacturing in Dubuque, Iowa, large quantities of spirits and high-wines, committed continuous frauds upon the treasury, by failing to make correct returns of the amounts manufactured by them, as required by section 53, and following, of the internal revenue act of 30th June, 1864. Section 68 of said act provides that the owner of any still, vessels, &c., used in the distillation of spirits, on which duty is payable, who shall neglect to make true entry and report of

the same, or cause to be done any of the things by law required to be done, shall forfeit all the liquors and spirits made, and all the vessels, stills, &c., used in the distillation; which liquors, vessels, &c., may be seized by any collector, and held by him until a decision thereon according to law; and section 48 provides that all goods, wares, &c., on which duties are imposed, found in the possession of any person for the purpose of being sold or removed in fraud of the internal revenue laws, may be seized by any collector, and shall be forfeited to the United States, and also the raw materials, tools, implements, and personal property in the place, or building, or yard, or enclosure where such articles may be found; and proceedings to enforce such forfeiture are authorized by both of said sections; and by sections 41 and 168 it is provided that one moiety of such forfeiture shall be to the use of the United States, and the other moiety to the use of the person who shall first inform of the cause whereby such forfeiture is incurred.

The petition alleges that between the 15th of April and 15th May, 1865, there were instituted in the United States District Court for the Southern District of New York proceedings under the above cited sections of said act of Congress for the forfeiture of nineteen hundred barrels of distilled spirits, which had been manufactured by said Rhomberg, wherein he had defrauded the government of $195,000 of duties on spirits manufactured by him, and not reported as required by law.

The petition also states a seizure of eleven barrels, and a prosecution on the same grounds for forfeiture in the northern district of New York, and also a similar seizure and prosecution of forty-four barrels of spirits in the northern district of Illinois; and also a similar seizure and prosecution in the district of Iowa, of the distillery and appurtenances of said Rhomberg in Dubuque, consisting of the grain, malt, hops, barrels, fuel, lumber, and a variety of other personal property in and about the

distillery, and two hundred barrels of high-wines, &c., all of which seizures and prosecutions by the United States were made on information first given by the plaintiffs. That the property so seized was of the value of $350,000, and that had the prosecutions been conducted to trial, they would have resulted in the condemnation of said property, as the guilt of said Rhomberg and his ownership of said property were not denied, but admitted by all concerned.

The petition, after thus stating facts which constituted the plaintiffs' title, proceeds to aver that Messrs. Sturges Sons and the Dubuque bank claimed to have made advances to Rhomberg on said distilled spirits, and insisted that they were innocent of said frauds, and to save their rights as creditors, after said prosecutions were begun, they proposed to the government that each party—they as claimants on account of their advances, and the government as claimants by virtue of such seizures—should compromise their opposing claims on the terms stated in a letter, dated June 26, 1865, set out in the petition, (page 8,) wherein they offered to purchase and pay for the property held by the United States under said seizures; the United States to convey and deliver said property to them, with a relinquishment of all claims against it for forfeitures and taxes. This proposition was made to Mr. Lewis, commissioner of the internal revenue, who had previously to this letter released the spirits seized in Chicago, Buffalo, and New York, and dismissed the proceedings, excepting in Iowa, and took in place of them the bond of Sturges Sons for $275,000, reciting the opposing claims of the obligors and the government, and leaving the questions involved to the decision of the commissioner.

In the meanwhile the United States continued its prosecution against the distillery, and to prevent the loss which would occur by stopping it, the officers in charge of it proceeded to use up the raw materials and stock on hand

which had been seized, and in so doing produced 75,000 gallons of spirits, valued at $150,000, and the money required to pay the expenses of so running the distillery, to the amount of $54,814, was furnished by Sturges Sons.

It was in this condition of things, and while the commissioner was engaged in investigating the questions of law and fact involved in consequence of the seizure, that said offer was made by Sturges Sons and the Bank, in which they say: "In view of the delay in the decision of our case before you, resulting, as we are informed, from a necessary investigation of certain legal questions, we offer, as terms of immediate and final settlement, the following compromise: The United States to convey to us the distillery and contents; also property of every kind seized or held as security for the default of Rhomberg," &c.—(p. 8.)

Commissioner Lewis went out of office on 30th June, 1865, leaving this offer pending. On the 3d of July his successor, Commissioner Orton, took up the matter, and in a report to the Secretary of the Treasury in July, states his views on the questions involved, and also sets out the difference between his conclusions and the opinion of his predecessor, appearing from a paper written by Mr. Lewis, dated 30th June, 1865, which Mr. Orton transmits to the secretary, and says: "Which I find among the papers on my table."

Commissioner Orton having held that the property was liable to forfeiture, concludes thus: "I beg to say, notwithstanding the difference between my views and those expressed by my predecessor, under the peculiar circumstances surrounding this case, if a satisfactory compromise of the whole matter is proposed, I am inclined to recommend its acceptance."

After this, on 26th July, 1865, Sturges Sons and the Bank sent to Commissioner Orton a letter modifying their previous offer, which, on the 27th, Mr. Orton in a letter to the secretary submits to him, and states his reasons at large

for advising the compromise, amongst which he says: "I assume that the property of Rhomberg is *insufficient to pay the taxes* due to the government at the time the fraud was discovered."

The commissioner thereupon, under the sanction of the Secretary of the Treasury, made a compromise with Sturges Sons and the Bank, as stated in the petition, thus: He delivered and relinquished to them the distillery at Dubuque and the appurtenances, and also the product of the distillery, namely: said $150,000 worth of liquor, free of tax, and also the moneys received at Dubuque, $54,814; also, the proceeds of cattle seized which had been sold, and also the liquors seized at Chicago, Buffalo, and New York, with the claim of the United States for forfeiture. In addition thereto, the government surrendered the said bond for $275,000, given by Sturges Sons and the Bank to abide the decision of the commissioner, and assigned to Sturges Sons a bond given by Rhomberg to the United States; and the government received two hundred and twenty thousand one hundred and two dollars ($220,102), in addition to the costs and charges accruing to the revenue officers for the seizure, which amount the Secretary of the Treasury stated to be composed as follows: $195,102 estimated deficiency of taxes, and $25,000 in lieu of penalties and forfeitures, and also $3,023$\frac{14}{100}$ was subsequently received by the government for interest on the deferred payments, for the purchasers asked and were granted time for part of the purchase money.—(See their letter of 26th May, p. 9.)

The settlement was made by authority of section forty-four of the act of 30th of June, 1864, which enacts that the commissioner, subject to regulations prescribed by the secretary, shall be authorized to remit and pay back duties erroneously or illegally assessed, or excessive in amount, or in any manner wrongfully collected, and also to repay to collectors money recovered against them in any court for any duties collected by them, and also all dam-

ages and costs recovered against officers of the internal revenue in any suit which shall be brought against them by reason of anything done in performance of their official duties, "and also compromise such suits and all others relating to internal revenue."

The secretary made said compromise against the wishes of the plaintiffs, and he now contends that the larger part of the money received was taxes, and is willing to allow the plaintiffs only the one-half of twenty-five thousand dollars, after deducting all expenses incurred by the government.

ARGUMENT.

This case is best understood by taking the events in the order in which they occurred; and first, we should look to the act of Congress of 30th of June, 1864, relating to the internal revenue. This act imposes duties upon distillers, requiring them to furnish to the government an account of what they produce, and to pay the duties thereon, (see sections 53 to 63,) and provides (in sections 48 and 68) that the failure to comply with the requirements of the law shall be a forfeiture of all the liquors produced, and all the vessels, apparatus, tools, and raw materials used in their production.

Under this law the plaintiffs undertook the performance of the services stated in the petition for the joint use of the government and themselves. This made them the employees of the government, and well understood legal rights accrued to them for their services, and they are entitled to the ordinary legal construction of the contract so entered into with the government, the same as if it had been made with an individual.

When the United States district attorney instituted the proceedings, they *were based upon a title* given by the law. "The forfeiture is the *statutory transfer of right.*"—(Caldwell vs. U. S., 8 How., 366, 381.)

To whose use had this transfer been made? Equally

and jointly to that of the government and the informer, and so continued until the final settlement was made. Mr. Justice Story says, for the court, in Jones vs. Shore, 1 Wheat., 462: "It is argued on behalf of the present collector, that * no title to a distributive share of forfeitures vests until the money has been actually received; * and in support of this argument it is further asserted, that, until this epoch, the claim is a mere expectancy and not a right, the interest being in abeyance, uncertain, and contingent. * * Whenever a forfeiture in rem accrues, it is, by the act, made the duty of the collector to seize the thing, and to prosecute a suit therefor to final judgment. * He seizes at his peril, and if the act be not justifiable, he is subject to a personal responsibility for all damages. * * It is unquestionably with a view to stimulate his vigilance and reward his exertions that the law has given him a share of the forfeitures recovered by his enterprise and activity. And yet it would follow, upon the argument which has been stated, that the collector who seizes, might be liable to all the responsibility of the act, in case of a failure, without receiving any of the fruits of his toil if crowned with success. This certainly would seem to be against the policy of the legislature, as well as against the plainest rules of equity."

In re Flourney, 1 Georgia State Reports, 606, it was held that the interest of an informer is a matter of contract, and a right of property vests beyond the power of the state to affect. This case cites The King vs. Amery, 1 Durnf. and East, 569, that although the King has the power to remit a forfeiture, yet he cannot revoke a moiety of the same given by law to a subject. It also cites 1 Nott and McCord, 26.—(See also Rowe vs. State, 2 Bay, (So. Car.,) 265; I Id., 378 U. S. vs. Morris; 1 Paine, 232.)

This right, transferred from the former owner by the statute, is property both of the government and of the indi-

vidual. There is no power in the Secretary of the Treasury to remit the informer's share in any other way than that provided by law.

In The Margaretta, 2 Gallison, 515, 518, Mr. Justice Story says: "The power to remit penalties and forfeitures is one of the most important and extensive powers which can be exercised under the government. It vitally affects the rights, the revenues, and the prerogatives of the United States. These cannot be waived or extinguished, except as provided by law. The party who sets up a treasury pardon must show that it is within the purview of the powers confided to the department."

In this case the secretary had undertaken to remit a part of the informer's share only. By the court (p. 522): "If, pending the proceedings, a remission be made of the whole property forfeited, his title is gone; if of a part only, his right attaches to the remainder.

"It is not, therefore, competent for the secretary to remit, *eo nomine*, the collector's share; for the law has expressly given him a moiety of the forfeitures recovered, and whatever may be the portion recovered, his right to the moiety thereof attaches. It is only by a remission of the whole forfeiture that the collector's share can be wholly defeated, and then it takes place by the mere operation of law." This case places a strict construction upon the power, and as that remission recited a special statute as the authority of the secretary to act, it was held that his act could not be referred to the general statute of 1797, and was void.—(See, also, The Palo Alto, Daveis' Rep., 393.)

In the U. S. vs. Morris, 1 Paine, 209, the power of the secretary to remit forfeitures is fully examined, and the court say that, before the act of 1797, courts were obliged to condemn property where the owner had innocently violated the law, and therefore the power to remit was given to the Secretary of the Treasury, to be exercised in cases of innocence. "A pardon, as the very term im-

ports, is an act of mercy, and generally supposes its object guilty. A remission, on the contrary, is an act of justice, and cannot be obtained until the entire innocence of the petitioner be established, not by testimony taken ex-parte, but after full notice to the proper officer of the government and the collector who makes the seizure" (p. 237).

See, also, U. S. vs. Lancaster, 4 Wash. C. C., 64.

In The Gray Jacket, 5 Wall., 342, 369, the court say: "The power of the secretary to remit forfeitures and penalties is defined and limited by law. The *jurisdiction* is a special one, and he may not transcend it. If he do, his act is void."

It will be observed that the act of July 13, 1861, there under consideration, refers to the act of March 3, 1797, as conferring the power of remission exercised in that case.

In U. S. vs. Morris, 10 Wheat., 246, (at p. 100 of 6 Pet. Cond.,) the court say: "Before such power to remit was given, (by the statute then under consideration,) the right of the custom-house officers attached upon the commencement of the prosecution, and could not be divested."

In McLean vs. The United States, 6 Pet., 404, there was involved the construction of several acts of Congress in relation to forfeiture, the remission thereof, and the rights of the seizing officer in the proceeds. The ship Good Friends and cargo had been seized as forfeited under the non-importation acts in force prior to 1st of July, 1812, and decree passed against them. The seizure was made 19th of April, 1812, and decree of condemnation the 17th of April, 1813. On the 29th of July, 1813, a special act of Congress was passed for the relief of the owners of the vessel and cargo, authorizing them to avail themselves of the privileges of the act of 2d of January, 1813, for the remission of forfeitures.—(This act of 29th July, 1813, is set out, p. 406.)

On the 1st of July, 1812, was passed "an act for imposing additional duties upon" property imported. Sec-

tion 1st says: "That an additional duty of one hundred per centum upon the permanent duties now imposed by law upon goods, wares, and merchandise imported into the United States, shall be levied and collected upon all goods, &c., which shall, from and after the passage of this act, be imported into the United States from any foreign port."

Section 4 provided for the collection of such additional duties in same manner as prescribed by law in relation to duties then in force.

Section 5 provided that the act should continue in force during the war with England, and for one year longer.—(1 Statutes, 768.)

On 2d of January, 1813, an act was passed providing that where goods were forfeited under the non-importation acts, the owners might petition, as provided by the act of March 3, 1797, for the remission of forfeitures, and where certain facts appeared as to citizenship of the owners, "the Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures that may have been incurred, * upon the costs and charges that have arisen being paid, and on payment of the duties which would have been payable by law on such goods, &c., if legally imported; and also to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued."—(1 Stat., 789.)

The result of all these acts "taken together is, that the Secretary of the Treasury was directed to remit the forfeiture upon the payment of costs and charges, and the double duties imposed by the act of 1st of July, 1812." The remission was in obedience to mandatory acts of Congress. The case came before the court on the application of the collector for a decree of distribution of the forfeiture accruing from the seizure and condemnation, the one-half of which was claimed by him as seizing officer.

The Secretary of the Treasury had paid to the collector the one-fourth part of the whole amount received; that is, he treated one-half as single lawful duties, and retained that entire for the government, the other half he treated as forfeiture, and distributed that equally between the government and the seizing officer.

On the argument of the cause the points made for the collecter were—

I. That the entire sum received is to be dealt with alike. It cannot be divided so as to consider a part of it forfeiture and the other part not.—(410, 416.)

This point was sustained by the court.—(p. 428.)

II. Although Congress might relinquish a part of the forfeiture incurred to the prejudice of the joint rights, yet they could not, of the portion received, give to the United States a larger share than to the collector.—(412.)

This point was sustained by the court.—(p. 426.)

III. The Secretary of the Treasury has no power to remit or relinquish the collector's part eo nomine.—(413.)

This was sustained.—(426.)

IV. No duties were by law payable on the goods, because they were brought in in violation of the prohibitory law. By this law they were forfeited to the United States immediately upon the commission of the offence, which was their arrival. When the seizure was made it had relation back to the time of the offence.—(Citing 8 Cranch, 398; also, U. S. vs. Mars., 8 Cr., 417; Gelston vs. Hoyt, 3 Wh., 146, 311.) "A forfeiture attaches in rem at the moment the offence is committed, and the property is instantly divested. If it be instantly divested as to the former owner, it is of course instantly vested in the United States; *but no daty is payable upon goods belonging to the United States.* The forfeiture over-reached everything."—(414.)

This point was sustained.—(p. 427.)

V. That in this forfeiture, accrued and perfected before the duties could accrue, the collector had, by law, a vested right to a moiety. It was his by *contract* as much as his salary, as a reward for his special exertions, exposure, and sacrifice.—(414.)

This point also was sustained.—(p. 426.)

For the United States it was contended, by Mr. Taney, attorney general: first, that the double duties were imposed as a penalty; but, as to single duties, they would have been due if the vessel had arrived after 1st of July; and as to these duties the importation was treated as if it had been legal.—(418.)

Second. "There was no contract; but supposing there was, it was no more than that the government would share with its agent whatever it received as penalty."—(421.)

The principle applied in this case is this: that as between the government and the seizing officer there was a legal contract, by which services were authorized to be performed by the officer for their *joint* benefit; that the performance of such services, or in other words the seizure and successful prosecution of the ship and cargo for forfeiture, actually worked a change of title of the property. So that, in law and fact, the title was vested, as of the date of the commission of the offence, in the government, for the joint and equal use of it and the officer. That this interest of the officer, although inchoate, was vested beyond any power in the government to modify, diminish, or impair, excepting as provided by law, in force at the time the seizure was made. That there could be a remission under the act of March 3, 1797, of all or a part of the forfeiture; but that the so-called *remission* which was made in this case, under the act of 29th July, 1813, was not in legal effect the same as if it had been made under the act of 1797; on the contrary, it amounted only to a reservation of so much in gross out of the forfeiture, and diminished only *pro tanto* the fund of the forfeiture;

and that of what remained the collector still retained, *ab initio*, his undivided one-half.

The collector put his case on the ground, that in himself there was an actual legal ownership of one-half the property, resting on a contract with the government. This ownership existed before the act of 29th July, 1813, was passed, and survived that act.

In the following language the court declare the rights of the collector vested, and not subject to be impaired by the subsequent act of 29th July, 1813:

"It has not been pretended that the act of the 29th July, 1813, could divest the rights of the collector antecedently vested in him by the existing laws."—(p. 427.)

To make out a vested title to the property in the collector, which, if done, necessarily includes the proposition that there could be no taxes chargeable against it, the court dwells with emphasis on the services rendered by him, and then state the result thus: "As a just reward for his diligence, and a compensation for his risks, the laws of the United States have awarded to him a large share of the proceeds of the forfeiture."—(426.)

They next proceed to state that in this case the seizure was "justifiable." "This is established, not only by the final decree of condemnation, but by the very terms of the remission granted by the Secretary of the Treasury." —(427.)

The next and consummating link in the chain of title is stated by the court to be the forfeiture, and the consequences thereof as affecting the questions in issue in that case as to whether the money paid could be taxes. After having stated that there was a forfeiture worked "*ipso facto*" by the illegal act, the court add: "It, the government, was entitled to the whole property by way of forfeiture, and to nothing by way of taxes."—(427.) The court do not here admit, but reject the suggestion that property which is actually forfeited, whereby the rights of the seizing officer come into *esse*, may, by agreement between

the government and the former owner, be reconveyed to him on payment of money as taxes. It was not subject to taxation after the forfeiture. The title had passed from the former owner free of all claim for taxes. It would not have been competent for the government, out of the proceeds of the forfeited property, to have deducted the amount of the taxes which would have accrued to it against the property had it not become liable to forfeiture; because, by the law, it was the property, *unincumbered by any preferred claim*, which was vested one-half in each of the joint owners.

It was not provided by law that the claim of the government for taxes might be asserted as a preferred claim over the right which accrued by the forfeiture.

It was also held that the power to remit under the act of 1797 remained until the proceeds have been actually received for distribution.—(426.) That the decree only ascertained that the seizure "was justifiable."—(427.) In the case at bar the evidence is just as conclusive that the seizure was justifiable. The petition asserts, and the government not only by the demurrer admits, but in the report of the Secretary of the Treasury, set out in the petition, states that the facts which made the forfeiture complete existed; and also states that the confession of fraud remained in the public archives in the Treasury Department. In U. S. vs. Morris, 10 Wheat., 246, (6 Pet. Cond., p. 102,) the court say: "The confession of the forfeiture before condemnation, remaining on the record of the Treasury Department, although not a judicial condemnation, might well be said to consummate the rights of the custom-house officers, if they are to be considered as becoming absolute, when the forfeiture is ascertained."

The case of McLean is cited and approved in Hoyt vs. U. S., 10 How., 109, 138.

In the case at bar there has been, as between the government and the plaintiffs, the conclusive ascertainment of the lawfulness of the seizure, which has transferred

the title of the property in question. There having been no remission of the forfeiture under the act of 1797, and the property not being liable to taxes, as a matter of law the money received was so much reserved out of the forfeiture.

In McLean's case the court laid much stress on the fact that the secretary had treated part of the amount reserved as penalty; and for that, as one of the reasons, held the settlement to be of a penal nature. Thus: "the very circumstance that the government itself has treated any part of the reservation as forfeiture, and as distributable accordingly, is conclusive to show that the whole is incapable of being treated as duties, * * part of it being confessedly received in the character of a forfeiture. We think the whole must be treated as received as a reservation by way of forfeiture."

It is contended in the case at bar that, by whatever name the Secretary of the Treasury called the money received, it was not in fact or in law taxes; but, on the contrary, was exclusively the avails of the transfer of the title to the property seized as forfeited, and of the relinquishment of all claims of government thereto which had originated in the seizures; and in legal intendment is so much reserved out of the asserted claims for forfeiture.

The calling part of the avails of the compromise by the name of taxes, does not convert it into a tax. Where taxes are paid, the mode of ascertaining the amount is fixed by law; the process so prescribed must be followed, the property being owned all the time by the individual, and the money paid by him according to the law.

Section 53 of the act of 30th of June, 1864, (p. 242,) requires the distiller each day to enter in a book, to be kept for that purpose, the quantity distilled, and, on the 1st, 11th, and 21st of each month to render to the assessor an exact account thereof; "and that he will, at the time of rendering said account, pay to the collector the

duties which by law are imposed on the spirits so distilled," and to secure the performance of all this, and the payment of the duties, the distiller "shall give bond to the United States in such sum as shall be required by the collector, with one or more sureties." There has been no attempt to ascertain the amount of taxes under these provisions, or in any manner whatever, by the assessor; the amount fixed was merely the "*estimated deficiency of taxes against said Rhomberg.*"—(p. 12 of petition.)

There is no power in the treasury officers, on a payment of taxes, to receive less than the actual amount due, nor to fix the amount by any other method than that prescribed by law. Such a power, if possessed, would enable the officers to raise and lower the taxes assessed against particular individuals. The taxes, so called, were not paid by or on behalf of Rhomberg, and no one else was liable for them. No receipt for taxes was given to any one, nor were Rhomberg's interests considered at all in the settlement. The purchasers of the property from him were negotiating with the United States for a confirmation of their title, and asked for a sale, transfer, and delivery of the property clothed with the title which the government had acquired. The government was acknowledged by the party who paid the money to have acquired a title which it was their object to purchase, and it was this title and not the original claim for taxes that Sturges Sons made the object of their offers; and the Commissioner of the Internal Revenue, who arranged the terms with Sturges, distinctly declares that the right of the government in the property was through the forfeiture alone.

Sturges and the Bank considered the case theirs; Rhombery was out of the question. The forfeitures by his frauds, standing confessed, had extinguished him. The questions to be settled were not respecting taxes due by Rhomberg, but their claims "*to the property of every kind,*" which questions they state, in their letter, it was in the

power of the commissioner to decide. In view of this, they ask the government to give up a part of what it claims, and they, in turn, offer to give up a part of their rights—that is, they offer specific terms of compromise.

In executive document, stated in the petition, (13,) the secretary, in reply to the inquiry of the Senate for information in relation to this transaction, says, that the commissioner acted under section 44 of the act of June 30, 1864, under regulations prescribed by the secretary "to compromise all suits relating to internal revenue. * This power has never, to my knowledge, been so exercised as to deprive the United States of a payment legally due and probably recoverable, but it is believed to be fairly applicable to a case of a *doubtful title*, where greater benefit was likely to arise from compromise than from prosecution."

The fact that $25,000 was charged by the government for relinquishing the forfeitures, shows that it was not the intention of the secretary to remit the forfeitures. A sale of the title acquired through the forfeiture not only was agreed for, but was the substance of the transaction as consummated. A forfeiture remitted releases the title thereby acquired; a forfeiture insisted on, reserves the title: and when a *sale* of such title is made, and the government holds on to the advantage it thus got; it cannot, under any form or pretence of combining it with a settlement of some other claim it may have, as for taxes, deprive the officer of his share of the proceeds of the settlement. What would Sturges Sons have given the government in exchange for a *receipt* for taxes against Rhomberg in this settlement, if it had not at the same time have effected a settlement of the claims for forfeiture?

Had this forfeiture been insisted upon, and the suits prosecuted, the government would have obtained the title no more effectually than it did in the transaction as it occurred; and Commissioner Rollins states that the settlement was made with the sole motive to save those who had innocently advanced money to the distiller.

The preceding argument has been to show first, that the authority of the secretary to remit the joint interest of the government and seizing officer proceeds from the act of 3d March, 1797, and that no portion of such interest can be gratuitously surrendered, excepting under that act; and also, second that the secretary in fact made no voluntary or gratuitous surrender of any of the joint rights and claims; on the contrary, as stated by him in his report to the Senate, he made the most out of them that could be made.

We will now examine said 44th section of the act of 1864, for the purpose of showing that it confers no power on the secretary to gratuitously surrender, or remit without consideration, the rights involved; but, on the contrary, his only power was, in good faith, to obtain the best terms possible for the parties interested. He stood in the place of the parties interested in the suit, and was in their joint interest, and had no power, under the name of compromise, to separate and divide the interest of the government from that of the officers; nor to settle terms which would make the results of the compromise enure to the advantage of either of the parties whose mere agent he was. The power given to the secretary extends no further than to agree with the *opposing* claimant on the division of the subject of controversy, and what the opposing claimant relinquishes belongs, not *de novo*, but by means of the previously existing title, to the parties to the suit. It is so much remaining to them out of what they claimed by the title of forfeiture. The same good faith and fair dealing on the part of the secretary, as the agent of the parties, is required as in case of any like transaction between private individuals. And the law implies that he shall bargain and agree with the opposing party so as to retain the largest share possible of that which is in contest. This authority is the opposite of that given by the act of 1797 to remit or mitigate on the ground of innocence.

It is not permissible, in making a compromise under this section of the statute, which makes no provision for any different distribution of the proceeds of a suit for forfeiture terminated by agreement, than if terminated by sentence in its favor, to impair the rights of either joint owner. There being an actual legal ownership of the suit, which is a proceeding valuable on account of its avails, the plainest reasoning of justice and law give these avails to the persons whose title is involved in the suit. A compromise is a common end of a suit, well known to the law, and yields fruits which are as thoroughly to every intent the avails of the suit as a writ of execution; and as this mode of terminating these suits is prescribed by the act in question, it may well be considered as in the category of process of law for the enforcement and realization of claims under the law. The informer's claim is, under section 44, subject to be dealt with according to these well known legal and equitable principles.

This transaction was not one in which the suits were first compromised with Sturges Sons, and after that the taxes voluntarily paid. The court below say this was so, but such statement is contrary to the record. Here the settlement was entire, and the secretary so states, although the court below, to sustain his act, state the contrary. Here no taxes were paid, *nor was any claim ever made for taxes.* The parties who paid the money never were liable for taxes, nor does the secretary pretend that they were, and the government expressly avows that there was not sufficient property of Rhomberg to secure the taxes, *and to save itself from failing in its claims* it states that it claims the property under the forfeiture alone. And yet the court below, contradicting the facts alleged in the petition, which the demurrer admits, say the money paid was "taxes pure and simple."

The court also speak of the distillery and appurtenances as subject to a lien for the taxes by the 55th sec-

tion of the act, and add, they were seized and held by the government at the time of the compromise, and that the property thus held exceeded in value the amount of taxes received, provided we include the seventy-five thousand gallons of liquor manufactured. But such articles seized and held are stated by the record to have been seized as forfeited for fraud, and not for taxes; and the court should not have included the $150,000 worth of liquors as part of that value, for said section 55 gives no lien for taxes on the liquors manufactured. All of the raw materials seized in the distillery, on which there might have been a lien, had been converted into said seventy-five thousand gallons of liquor, having first been seized as forfeited, which Commissioner Orton asserted to be the absolute property of the government as the manufacturer thereof; the court, therefore, in treating this seventy-five thousand gallons as part of the aggregate property on which the government had a subsisting lien for taxes, are contradicted by the public document they refer to.

Judge NOTT, in a dissenting opinion, thus reviews the whole case:

"If this disposition can be made of the avails of the proceedings *in rem*, based upon the collector's seizures and information, it is, I feel warranted in saying, the first case in the history of our revenue laws where perfect good faith has not been kept with the officers making the seizures; and where the government has received a greater share of the proceeds or result of the seizure than the party who instituted it, and at whose risk and through whose diligence it was prosecuted. That such a distribution must rest on something more substantial than the secretary's calling the moneys, which he has retained, by one name instead of another, is not disputed; but neither the reasons advanced nor the authorities cited afford, in my judgment, a sufficient ground to sustain the doctrine contended for; and I am compelled, therefore, to dissent from the conclusion of the court.

"The case of The United States vs. Morris, 10 Wheat., 246, is cited by the defendants. It decides nothing more than this: that the authority to remit the forfeiture is not limited to the period before condemnation or judgment, but that 'the authority to remit is limited only by the payment of the money to the collector for distribution.' So Mr. Justice Thompson also says: '*If the government refuse to adopt his* [the informer's] *acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates.*' Whence I infer that the Supreme Court believed that if the government *did adopt* his acts, and did *not* waive the forfeiture, nor repudiate his proceedings, but, on the contrary, reaped a great and direct benefit from them, that then and in such a case the informer would be entitled to recover his share of that which the government received by and through the adoption of his acts, and the proceedings upon his information."

"In the case now at bar, there was an action instituted by the government upon and as the direct consequence of the collector's proceedings. Whether that action was prosecuted to judgment, and the money was paid for distribution upon the judgment, or whether it was ended by compromise, and the money was paid for distribution under the compromise, I deem to be immaterial. Whether that action was rightfully brought, and the government might have recovered ultimately if it had proceeded, or whether it was brought wrongfully and the defendants, to be rid of it, paid their money voluntarily and foolishly, I also deem to be immaterial. The only question for me to consider, in my opinion, is whether the money received was the fruit of the action. The petition very clearly shows that it was. No other action or proceeding was pending against Rhomberg to which the compromise could be extended; no other information had been given which could be deemed the basis, in whole or in part, for that action. Through the proceedings of the collector the government received a large sum; without the proceedings of the collector it would have received nothing. The money was the avails of the action, and the action was to enforce the forfeiture. If any further circumstance were needed to establish this, it is found in the fact that the suit was not discontinued first and the taxes paid afterward; nor were the taxes paid voluntarily and

the suit discontinued afterward; but the money paid was exacted by the suit, and by it alone, and the consideration which the government gave for this money so paid was not a receipt for taxes, but a relinquishment of the property which was held for forfeiture.

"It was thought by the Secretary of the Treasury that the government had a lien upon the property for its unpaid taxes. That might be so; yet it is most certain that the action in the district court was never instituted to enforce that lien. That was an action in which the government and the collector were jointly and equally interested, brought to recover property which the law declared forfeited for the fraud confessed of the manufacturer. Whatever was received through and in consideration of its discontinuance, was received for the use and benefit of the parties jointly interested, and was to be divided and apportioned as the law determines the extent of their respective interests. If the suit had been discontinued, and the agreed forfeiture paid, and the property given up to the defendants, and if the government had then proceeded with knowledge acquired through the informer's discoveries to enforce its lien for taxes by another proceeding, then it might be held correctly that the informer's rights were gone. But when the government never trusted the defendant for an hour, nor gave up possession of the property until the money was paid, but used the suit brought on the claimant's information as its only engine for coercing payment, how can we call that a payment of taxes which was in fact a consideration given for the discontinuance of a suit and the surrender of property seized, and subject, or supposed to be subject, to forfeiture?

"It is also thought by a majority of my brethren that the power given to the commissioner, by the 44th section '*to compromise all suits relating to internal revenue*,' gave to him a new power over the rights of the collector, and an authority to distribute the proceeds of the suit in a manner different from that which the law had previously determined. This word 'compromise' has a common and well-known signification, and always imports a mutual concession; but it must be, as I think, a concession between the parties to the '*suit*.'

"Now here we have a proceeding in which the government is the plaintiff, and the owner of certain property is

the defendant. The 'compromise' referred to is a settlement between these parties, and not between the plaintiff and third persons, strangers to the record. The statute speaks of a 'compromise' of the '*suit*' and not of a right or claim growing out of the seizure, and relating solely to one who is no party to the 'suit.' It was no concern of the defendant what was to be done with the money which he paid to be clear of his own wrongful acts. All that he was interested in was in recovering back the property against which the suit was brought. There could be no compromise where there was no controversy. As between the claimants and the government there was no controversy, for they were interested only in the forfeiture or its avails; and as to them, the law determined how they should be apportioned. To extend the signification of this word, so far as to infer from it a power in the secretary to compromise more than the '*suit*,' and an authority to re apportion the avails in a manner different from that which the law had already done, or which a court might do, if the proceeding went to judgment, seems to me to be carrying the meaning of the word beyond the bounds of fair construction, and beyond the intent and policy of the law.

"There is, as I understand the facts, no doubt but that the claimants would have been entitled to the moiety of this sum of $195,102, if the secretary had not called it by the name of taxes. All that there was of the compromise was that the owners paid $220,102, and received back their property, worth $350,000, with a discontinuance of the suit. As to the imaginary parts of which this sum of $220,102 was composed, it rested entirely within the breast of the secretary to say what they should be. He had indeed determined within his own mind that the compromise should consist in his receiving a sum equal to the taxes on a part of the property, and another sum, fixed arbitrarily, which he called the forfeiture. If, after the money had been paid, he had reconsidered his determination, and called the $195,102 forfeiture instead of taxes, the claimants would have been entitled to one-half of this, and the defendant in the other suit would have been neither injured nor affected; and if, on the contrary, he had reconsidered his determination, and called the $25,000 taxes on some other portion of the property relinquished, the claimants would have been entitled to nothing, and

the defendant in the other suit would have been neither benefited nor affected. Now the plain English of this is, that the secretary had not only a power to compromise the suit, but an absolute right of distribution over the proceeds. The record indicates, and I understand the fact to be, that no express or stipulated compromise was ever entered into between the government and the owners, which provided for or affected the distribution of the moneys received. A bond was indeed given upon the release of the property for the costs, taxes, and $25,000 in lieu of penalties; but the $25,000 in lieu of penalties was not to be paid as a separate and distinct sum; and, on the contrary, the bond was conditioned for the payment of three instalments, '$50,000 *in one month, and the balance in two equal payments, one-half in three months, and the other in five months.*' This was equivalent to the payment of a sum in gross, and made the $195,102, called taxes, as completely a part of the sum '*reserved by the government out of the forfeiture*' as the $25,000 called '*in lieu of penalty*'; and '*whatever is reserved by the government out of the forfeiture,*' says the Supreme Court, '*is reserved as well for the seizing officer as for itself.*'—(*M'Lane vs. The United States, p.* 426.)

"The conclusions to which I have come are these—

"1. The sum of $220,102 was, in the language of the Supreme Court, '*a gross sum*' reserved by the government '*out of the forfeiture as a condition of the remission,*' (6 Peters, 427,) and calling it money received for taxes could not alter its character, nor impair the collector's rights.

"2. The government and the collector were, in effect, partners in the enterprise; the government had a controlling right to abandon the adventure, but had no right to remit its partner's share and retain its own, nor to apply, upon an individual indebtedness, moneys received through the joint enterprise.

"3. The 44th section of the internal revenue act of 30th June, 1864, authorized the Commissioner of Internal Revenue to compromise with the owners of the forfeited property, but did not authorize him to compromise with the collector. The moneys received from such a compromise, and in consideration of a release of the forfeited property were, in legal effect, moneys reserved from the forfeiture and the fruit of an action, in which the collector was jointly and equally interested with the government.

"4. The acts of the collector in the case at bar came within the general policy of the United States; which is, that whenever the government adops the acts of the informer, and proceeds upon his discoveries and to his risk, it will share equally with him whatever may be received through his proceedings; which policy has never been departed from since the establishment of this government, and has been clearly indicated by its statutes, and solemnly and repeatedly pronounced by its highest judicial tribunal."

The case made by the petition shows an inchoate title vested in the petitioners, in which the government had the same interest as they; prosecuted by the government with success, never divested by surrender by the government to the owner on the grounds of innocence, but, on the contrary, persisted in to a successful issue.

M. BLAIR,
F. A. DICK,
Of Counsel for Plaintiffs in Error.

FEBRUARY, 1869.

APPENDIX.

39TH CONGRESS, 1st Session. } SENATE. { EX. DOC. No. 21.

LETTER

OF THE

SECRETARY OF THE TREASURY,

COMMUNICATING,

In compliance with a resolution of the Senate of December 12, 1865, information in regard to the seizure of property, for a violation of the revenue laws of the United States, belonging to J. A. Rhomberg & Company, of Dubuque, Iowa.

FEBRUARY 6, 1866.—Read, ordered to lie on the table and be printed.

TREASURY DEPARTMENT,
February 5, 1866.

SIR: I herewith transmit a report of the Commissioner of Internal Revenue, prepared at my request, in response to a resolution of the Senate of December 12, as follows:

"*Resolved*, That the Secretary of the Treasury be directed to communicate to the Senate all of the facts in regard to the seizure of property, for a violation of the revenue laws of the United States, belonging to A. Rhomberg & Company, of Dubuque, Iowa, upon what terms a settlement was effected with said Rhomberg & Company, and under what authority of law the corn seized by the United States as the property of said Rhomberg & Company was converted into whiskey and afterwards delivered to them without requiring the duty imposed thereon by law to be paid by them."

The statement of the Commissioner is believed to embody an accurate and precise account of the facts alluded to in the above cited resolution, and of the terms upon which a settlement of the case was made. It will be observed that the final compromise was concluded under the impression, as yet unshaken, that no larger sum was likely to be obtained by prosecuting the case, and that such a prosecution would, in all probability, involve the ruin of parties innocent, so far as the information of the department extended, of any complicity in the fraud.

To that portion of the resolution which asks information as to the law under which "the corn seized by the United States as the property of said Rhomberg & Company was converted into whiskey and afterwards delivered to them without requiring the

duty imposed thereon to be paid," I reply by calling attention to the facts as stated in the Commissioner's report, and to that part of the 44th section of the act of June 30, 1864, which empowers the Commissioner of Internal Revenue, under regulations to be prescribed by the Secretary of the Treasury, to compromise all suits relating to internal revenue. The regulations framed by my predecessor require the submission of every such compromise by the Commissioner to the Secretary. This power has never, to my knowledge, been so exercised as to deprive the United States of a payment legally due and probably recoverable; but it is believed to be fairly applicable to a case of doubtful title, where greater benefit was likely to arise from compromise than from prosecution.

I have but to add that while exercising my best judgment on the facts presented to me, I have taken no step in compromise of this matter in which I was not supported by the advice of the Commissioner of Internal Revenue.

H. McCULLOCH,
Secretary of the Treasury.

Hon. LAFAYETTE S. FOSTER,
President of the Senate.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, *January* 25, 1866.

SIR: I have the honor to acknowledge the réceipt of your letter of December 14, enclosing a resolution of the Senate of the United States asking information in relation to the case of J. A. Rhomberg & Co.; and, in accordance with your request, I herewith transmit a statement of facts derived from the papers and records on file in this office.

I may premise that this was one of the earliest of the whiskey frauds presented to this office for its action; and that while the amount claimed to be due was very large, the rights of various parties were at stake, conflicting interests were to be regarded, and many perplexing questions were presented, requiring an immediate decision without the aid of that practical knowledge of the subject-matter which the subsequent experience of our officers enabled them to acquire.

The consideration of this case was commenced by Judge Lewis, although the final decision was not made until after the commencement of the term of Mr. Orton, my immediate predecessor. I have not a personal knowledge of all the details of the case, but believe that the papers and records of this office show all the material facts concerning which information is desired.

Early in April, 1865, it was discovered that large quantities of distilled spirits were passing through Buffalo, shipped from some point or points west to New York city under circumstances which induced the belief that the law was being in some way evaded. The attention of Collector Dorsheimer and Assessor Presbrey, of the thirtieth district of New York, was called to the matter, and after examination they deemed it their duty to proceed to New York city to make the necessary investigation and ascertain the facts in the case.

On the 17th of April Messrs. Dorsheimer and Presbrey reported from New York that they had found in the hands of A. L. Rowe & Co. one hundred and twelve barrels, and in those of A. B. Warner fifty-six barrels; that a lot had also been found in possession of David Dows & Co., and one hundred and seventy-six barrels on the dock. They added that all this property had been seized by Collector Dorsheimer, and, under advice of the United States district attorney, passed over to the United States marshal. A large quantity was stated by them to be still on the way between Buffalo and New York which would be seized upon its arrival.

Some of the wines consigned to Dows & Co. had been sold at two dollars per gallon. The expense of freight was stated to be about fifteen cents per gallon, and other expenses two to three cents per gallon.

It was ascertained that these wines were made by J. A. Rhomberg & Co., of Dubuque, Iowa, and shipped to New York by Sturges Sons, of Chicago, who had made advances upon them. A part were high-wines and a part alcohol. Such of the barrels as were inspected bore the brand of J. O. Mearer, United States inspector, Dubuque, Iowa, and were all, or nearly all, inspected between March 14 and 23.

It was further stated that the consignees of these spirits, particularly Rowe & Co., were suspicious of their fraudulent introduction into the market, and Rowe had consulted counsel as to the propriety of selling the same, and was advised not to dispose of them.

Messrs Dorsheimer and Presbrey expressed the opinion that a fraud had been committed, but that it would require a thorough investigation at Dubuque, and advised that some one should be sent their at once.

Mr. Presbrey was thereupon directed by telegraph to proceed to Dubuque and make the necessary investigation, and a commission as special agent for a limited time was sent him, which was extended twenty days on or about May 5 following.

On the 24th of April Collector Dorsheimer seized at Buffalo eleven barrels of alcohol without inspection marks, marked J. A. Rhomberg & Co., Dubuque, Iowa, supposed to be a part of the same lot.

April 27 Mr. Presbrey reported from Dubuque that after much difficulty he had succeeded in obtaining many facts in relation to Rhomberg's affairs.

It appeared that he began to run his distillery about December 25, 1864, and had reported and paid duty on 79,183 gallons, the amount of tax on which was $155,350.50. He had shipped to New York, since January 13, 1,287 barrels high-wines, estimated at 77,000 gallons; also, 1,090 barrels alcohol, equal to about 86,000 gallons high-wines. He had also shipped both up and down the river, and had a considerable local trade. His distillery cost, the year previous, about $130,000, and was most perfect in all its appointments.

April 28 Mr. Presbrey reported that he had obtained satisfactory evidence of the fraud; that the deputy collector had seized the distillery, with its appurtenances; about 50,000 bushels shelled corn, 2,000 bushels wheat, 2,000 bushels rye, 8,000 oats, 8,000 malt, 15 bales hops, 300 cords wood, 100 tons coal, 7 wagons, 11 horses, harness, &c., 6,000 staves, 580 whiskey barrels, 309 head of cattle, with all the cattle sheds and certain lots of real estate; about 200 barrels high-wines, 100,000 feet of lumber, and all the liquors in the wholesale store of Rhomberg & Co.

Rhomberg had kept no distiller's book, and, on being examined, admitted the fraud, and stated that he had paid no duties on the wines made into alcohol; that his custom was to have a certain number of barrels of high-wines inspected, and when the inspector had left he would empty them into the alcohol still and refill the barrels with other wines.

It was represented that he professed to regard the change of the time when the tax of $2 per gallon was to take effect, from February 1 to January 1, as in effect a fraud upon him, and that, having started his distillery and made his contracts with the understanding that the tax was not to be increased until February 1, he was induced by the change to commit the fraud to save himself from financial ruin.

As soon as the seizure of the wines in New York became known, Rhomberg gave to Sturges Sons a mortgage upon his property at Dubuque for $118,000, also another to J. K. Graves, on account of the Dubuque branch of the State Bank, for $60,000, to secure them for advances made. These mortgages were executed April 18, but dated back to March 8.

The total amount of tax found to be due was about $194,000, of which there was paid by Sturges Sons about $33,000 immediately upon hearing of the seizure in New York, that being the amount then admitted to be due by Rhomberg, which would leave the balance actually in arrears $161,156.

There had been seized at Chicago, Buffalo, and New York 1,090 barrels high-wines and 1,287 barrels alcohol.

Mr. Presbrey also stated that the distillery had been run after

the seizure in order to feed the cattle. It was also stated that the corn and grain seized would heat, mould and become worthless, unless some disposition was made of the same; and instructions were asked as to what should be done.

In reply to this, Commissioner Lewis telegraphed to Mr. Presbrey, under date of May 1, 1865, as follows: "Hold all property seized. Run distillery to save perishable property and feed cattle." And on May 6, again instructed him by telegraph: "If owner does not give bond let cattle be sold if you can't feed them advantageously; see proviso to section 48."

I may as well state here that the cattle were afterwards sold under an arrangement between the parties and the officers, and the proceeds deposited to await a decision as to the right of the government to hold the same.

May 3, Collector Dorsheimer reported the amount seized by him to be about 1,900 barrels, one-half high-wines and one-half alcohol; and May 6, he states the amount seized in New York at about 1,800 barrels, and in Buffalo 350 barrels.

May 26, a proposition was made by A. B. Robinson, cashier, in behalf of Sturges Sons, the Dubuque Branch Bank, and J. A. Rhomberg & Co., to compromise the case upon the payment of one hundred thousand dollars as taxes and five thousand dollars as penalties, the government to release all the property seized; which proposition was rejected by letter of June 1, 1865.

Messrs. Sturges Sons, who were bankers doing business at Chicago, claimed to have made advances upon the spirits seized at Chicago, Buffalo, and New York; that they had no knowledge or suspicion of the fraud perpetrated by Rhomberg; and that they were entitled to a release of the same. Some time prior to May 22, they appeared before Commissioner Lewis, on whose recommendation, after consideration of the questions involved, it was agreed that those spirits should be released upon their filing a satisfactory bond; in pursuance of which arrangement, on the 22d of May, Sturges Sons and the Dubuque Branch Bank as principals, and Samuel J. Walker and Frank Sturges as sureties, executed to the United States their bond in the penal sum of two hundred and seventy-five thousand dollars.

The condition of this bond recites the seizure of the distillery and other property at Dubuque, and of the high-wines and alcohol at Chicago, Buffalo, and New York, estimating the value thereof at $272,000; and adds that Sturges Sons and the Branch Bank had advances on said high-wines and alcohol, upon clean bills of lading, the sum of two hundred and eighty thousand dollars, and provides that if it shall be determined by the Commissioner of Internal Revenue that the said high-wines and alcohol so advanced upon as aforesaid are not subject to the lien of the government for revenue duties as against the advances made by said firm and said bank, or if the said obligors shall pay to the

proper collector of internal revenue such sum of money as the Commissioner shall determine to be due the government for said high-wines and alcohol, or either of them, then the obligation shall be void. "It being understood that the obligors are not liable under the bond for any penalty which the government may assess against Rhomberg & Co., but shall only be liable for the actual amount of duties found to be unpaid, together with proper costs and charges attending the investigation of the case and seizure of the property."

Upon the filing of this bond, the spirits seized at Chicago, Buffalo, and New York were ordered to be released, and the proceedings instituted for their forfeiture to be discontinued, which order was carried into effect in accordance with the agreement contained in the bond.

The evidence presented upon the question raised under the bond tended to show that Sturges Sons, through their agent, J. K. Graves, an officer of the Branch Bank, had advanced upon the spirits the sum of $258,000, on bills of lading forwarded from time to time, and the Branch Bank the sum of $14,382.60; and that the Branch Bank had also advanced on material an additional amount, making the total advances by the bank $141,000; or a total advance by these parties of $399,000.

It also appeared that Graves, acting for the bank and as the agent of Sturges Sons, had, on several occasions, inquired of the local officers whether or not Rhomberg was making correct returns and paying his taxes regularly, and was answered that he was; but it does not appear that any inquiry was made or examination had as to the number of gallons returned, or upon which the duty was paid.

The books of the station agent at Dunleith, Illinois, show that there were shipped from that point to New York of Rhomberg's spirits, on account of these parties, 1,090 barrels of high-wines, and 1,287 barrels alcohol; making in all about 159,000 gallons high-wines, or about 80,000 gallons over and above the amount returned, on which the duty was paid.

Under the agreement contained in the bond various affidavits and depositions were taken; after consideration of which, Commissioner Lewis, under date of June 30, rendered his decision upon the question submitted, to the effect that the government had a lien upon the alcohol seized for the tax due, Sturges Sons having also a lien thereupon subject to that of the government; but that the government was bound to make the tax due out of the other property seized, or so much of the same as it could, before calling upon Sturges Sons for payment of the remainder.

Annexed is a copy of the decision made by Commissioner Lewis, marked A; also a copy of the letter of Commissioner Orton, dated July 3, 1865, transmitting the same to the Secretary of the Treasury, marked B.

It is thought, that under this decision, nothing could have been realized from the bond given in May, at least without abandoning all claim to *forfeiture* of the property seized at Dubuque under the proceeding *in rem* which had already been instituted. That property, as decided by Judge Lewis, must have been sold upon distraint for taxes, and not under a decree of forfeiture, before anything became due from the spirits, for whose release the bond was given. For this and other reasons the bond may be regarded from the time of this decision as nearly or quite unavailable.

Pending the decision by Commissioner Lewis of the question of liability under the bond of May 22, Sturges Sons and the Branch Bank, on the 26th of June, submitted another proposition for compromise, a copy of which is hereunto annexed, marked C. In this they propose to pay, upon the conditions stated, the tax due, $161,156, and any further sum that might be adjudged by the Commissioner to be due to the informers for services, not to exceed $10,000; all the property in the possession of the government to be turned over to them.

This proposition was on June 30 transmitted to the Secretary of the Treasury by Commissioner Lewis, with the recommendation that it be accepted, and that the amount to be paid, over and above the tax, be fixed at $6,000, which, as I understand the case, was all to be paid over to the informers. On the 26th of July, while the consideration of the former proposition was pending before you, the parties submitted a further proposition, a copy of which is also annexed, marked D, accompanied by a statement from the deputy collector and deputy United States marshal having the distillery in charge, showing that the cost and expense of the wines manufactured after the seizure were estimated at about $55,000. The expense attendant upon the manufacture, exclusive of the materials seized with the distillery, was paid by Sturges Sons and the Branch Bank. A further statement was also submitted from Collector Fuller, Deputy Collector Eighmey, and Assessor Jarrett, indorsed by Hon. W. B. Alison, M. C., and Hon. John Thompson, mayor of Dubuque, certifying that the value of the property seized at Dubuque, exclusive of that consumed in the manufacture of spirits subsequent to the seizure, would not exceed seventy thousand dollars ($70,000.) This additional proposition was transmitted to you by Commissioner Orton in a letter dated July 27, 1865, a copy of which is hereunto annexed, marked E, which contains a fair exposition of some of the difficulties in which the case had become involved.

After careful consideration and discussion an arrangement for the settlement of the case was effected on the following basis, viz: Sturges Sons to pay the tax due, and a further sum of $25,000 in lieu of all penalties and forfeitures incurred by

Rhomberg, together with the costs and charges accruing to the revenue officers for the seizure, the United States to release and turn over to them the property under seizure, to surrender and cancel the bond of May 22, to surrender, free of tax, the wines produced since the seizure, and also all moneys received as proceeds of the sale of the cattle, and to assign to them a bond given to the United States by Rhomberg & Co. as distillers, said property to be released upon their filing a bond conditioned that they should pay the costs aforesaid, and also the sum of $161,156 tax and $25,000 in lieu of penalties, as follows: $50,000 in one month and the balance in two equal payments, one-half in three months, and the other in five months, with interest from the date of said bond. This bond was executed August 12, 1865, as appears from a copy filed in this office, and the necessary orders given for the return of the property; and, as I understand, the full amount, with the interest as stipulated, has now been paid.

From the foregoing statement and the papers annexed it will be seen that serious difficulties and complications had arisen in the case.

While the distillery and fixtures were in possession of the United States marshal, awaiting a decree of forfeiture, the personal property found at Dubuque had been distrained upon for taxes, the corn and grain, however, having been converted into spirits under an order of this office. This order was undoubtedly intended to prevent diminution in the value of the property, but I am constrained to think with my predecessor, Mr. Orton, that it was not justified by any law applicable to the case, while it produced a most serious complication.

The government having seized this property, and subsequently changed its character by distillation, the question of ownership of the spirits thus produced immediately arose, and proved especially embarrassing. This question was discussed at some length by Mr. Orton in his letter of July 27; and it will be observed that he reluctantly comes to the conclusion that these wines were the property of the government. The government was clearly the manufacturer; and if it was likewise the owner, the liability to tax disappeared; for had the property been sold or transferred, the purchaser or assignee would, of course, have taken it free of such liability. The questions of ownership and taxation here raised are in no point of view easy of solution. Almost the entire value of spirits at that time was conferred by the tax. It might reasonably be doubted whether the government or Rhomberg was sole owner, or whether a joint ownership existed, Rhomberg having an interest to the value of the materials seized, Sturges Sons to the amount of expenses paid by them, and the government to the extent of the additional value conferred by the manufacture. Rhomberg owned the materials,

for his title had never been divested; the government converted these materials into high-wines, Sturges Sons and the bank advancing the necessary funds therefor. I am of opinion that, while the decision of these matters was in itself difficult, involving, perhaps, future claims from parties interested, the case would not be relieved of any of its difficulties by the adoption of either theory.

In relation to the wines and alcohol seized at Chicago, Buffalo, and New York, it appears from the papers herewith submitted that there was some conflict of opinion as to the legality and binding force of the bond taken May 22. The seizure made was not to enforce any supposed lien which the government might have had for the tax due, for prior to April 1, 1865, the law gave no lien therefor; but the seizure was made to enforce the forfeiture under section 68. The seizure was justifiable under this section, but not under any other provision of the law. They were all tainted with the fraud, and subject to absolute forfeiture whenever the government asserted its right, and the forfeiture related back to the time of the commission of the fraud, avoiding all subsequent conveyances, even to *bona fide* purchasers. This right of forfeiture, however, was clearly waived by the acceptance of the bond of May 22, under which the only question to be settled was, as to whether or not the government had a lien, not for forfeiture, but for the duties due. If this lien existed, it must have been by the provisions of section 55; but the clause giving the lien in that section did not take effect until April 1, subsequent to the distillation and removal of these spirits, and after the tax had accrued upon them.

Such being the position of the property seized, and of the claim of the United States, it became a question whether the government should go on with the suits for forfeiture at Dubuque, and with the distraint for collection of taxes. Had a decree of forfeiture been reached, the property affected by it would necessarily have been divided with the informers, leaving but one-half the net proceeds to the United States. Had the personal property which had been seized on distraint for taxes proved insufficient to satisfy that claim—and it is difficult to doubt that such would have been the result—the remainder of the tax would have been lost, (as Rhomberg had not the ability to pay it,) unless it could have been recovered by suit against Sturges Sons, on the ground of a virtual copartnership between their firm and Rhomberg, such recovery being, to say the least, very problematical.

Under these circumstances, there did not seem to be any doubt as to the propriety of making such a settlement as would be most advantageous to the government. Hence the case was finally settled on the terms stated; and I do not hesitate to give it as my opinion that, by that settlement, more money has been received than could have been realized by any other course in the

then condition of the case. There was another element in the case which did not lessen its difficulties. The parties claiming as informers were opposed to and protested against any settlement. They, naturally enough, desired that the proceedings for forfeiture should be prosecuted to final judgment, as that would have entitled them to one-half the proceeds of the property forfeited.

While it was deemed proper that their claims should be considered and provision made in the settlement for a fair compensation to them, it was not deemed that the government was bound to take such a course as would render it impossible to collect the large amount due for taxes, in order that they might receive one-half the proceeds of the property seized for forfeiture.

Had the bond offered for wines and alcohol been refused, and the right of forfeiting these articles thus preserved, the government might, probably, by using this right and declining all compromise in the other branches of the case, have received, eventually, a larger sum than has been realized from the settlement, while an enormous amount would have been awarded to the informers. But this result would have been obtained by imposing financial ruin upon the parties who made advances to Rhomberg, and perhaps upon others connected with them in business; and yet these parties cannot, on the testimony obtained, be regarded as implicated in the fraudulent evasion of the law. The evidence submitted to Commissioner Lewis failed to connect these parties with the fraud of Rhomberg. He discusses this question at some length in his decision of June 30—paper A; and no evidence has been since submitted which controls his finding upon this point. While the government claimed, and was authorized by the law to insist upon, the right to a forfeiture of spirits situated as these were, doubts arose as to the propriety of enforcing this right in all cases. At the time of the seizure of these spirits the market was depressed, and spirits were selling in the principal markets at prices varying but little from the tax. It was believed, and subsequent investigations have shown, that such was the fact, that much of the spirits thrown upon the market were contraband. Honest manufacturers were compelled to close their distilleries because they could not dispose of the product without a total loss of the cost of production and transportation to market; and they insisted that it was the duty of the government to protect them against this illicit manufacture. It was believed that such protection could only be afforded by prompt and energetic action, and accordingly many other seizures were made of spirits which were believed to have been thrown upon the market fraudulently. These seizures, however, created a great alarm among the dealers and those who had made advances upon such spirits, who saw themselves threatened with great loss, if not absolute ruin, by the seizure and proposed forfeiture of

their property, and not for any fraud committed by them, or of which they had any cognizance.

This aspect of the case was very strongly presented to you, and also to my predecessors; and it became a matter of serious inquiry whether or not some course could not be devised which should vindicate the law and effectually protect the honest manufacturers without subjecting innocent parties to serious loss. After careful consideration the policy was finally adopted that the right of forfeiture should not be insisted upon where it was proved that the property seized was in the hands of *bona fide* purchasers or holders having no complicity with the fraud committed, and subsequent experience has shown the wisdom of this course. This policy was not, I think, fully decided upon until after the seizure in this case; but the reasons which induced its adoption undoubtedly had great weight in bringing about the arrangement which resulted in the release of these spirits under the bond of May 22d. It is sufficient to say that after the introduction of this rule confidence was restored, the price of spirits steadily advanced, and the duties collected were largely increased.

The plan pursued in the settlement of these cases of fraud has not been to crush and ruin the parties and all those who are or have been in any way connected with them. The first care has been to secure the payment of the duties due the government, and, in addition, to enforce the payment of such further sum as penalty as would tend to produce a due respect for and compliance with the requirements of the law.

Your obedient servant,

E. A. ROLLINS,
Commissioner.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

A.

This case arises under these circumstances:

J. A. Rhomberg & Co., distillers, at Dubuque, Iowa, began the manufacture of high-wines and alcohol late in December, 1864. The distillery was built at great expense, was in good running order, and the product was large. Funds were wanting, and in order to procure the necessary amount, the distillers consigned for account of the Dubuque Branch Bank and Sturges Sons, from time to time, in bills of lading, large quantities of wines and alcohol, on which advances were made by the consignees nearly up to the value of the liquors.

Late in April, Assessor Presbrey, acting as special agent of the Treasury Department, discovered that the distillers were fraudulently evading the payment of the taxes, and the distillery was seized at his instance, and proceedings in forfeiture immediately instituted. An examination was made of the transactions of the firm, and, according to Mr. Presbrey's statement, it appeared that returns had been made of 79,183 gallons, and that taxes to the amount of $155,350.50 had been paid.

There had been shipped to New York of high-wines, 77,000 gallons.
Of alcohol, about..... 86,000 "

Total in 2,370 barrels.....163,000 "

This had all been done since January 13. The estimate made by Mr. Presbrey showed that the sum remaining due for taxes was $161,156.

Efforts were immediately made to seize the wines which had been shipped to New York, and there were seized in New York, in the hands of David Dows & Co., 525 barrels of high-wines and 494 barrels of alcohol, on which David Dows & Co. had advanced to Sturges Sons $119,000 and paid freight $86.90. There were seized in the same city, in the hands of J. M. Fiske & Co. received from Sturges Sons, 259 barrels of high-wines and 438 of alcohol, and in the hands of A. L. Roe 112 barrels of alcohol and 56 barrels of high-wines.

Seizures were also made in Chicago and Buffalo. The whole amount seized seems to be—

Of alcohol..... 1,090 barrels.
Of high-wines..... 1,287 "

Mr. Presbrey estimates the high-wines to be 61 proof gallons to the barrel, and the alcohol at 74. This is probably an outside estimate as to the high-wines.

At this estimate there would be—

High-wines..... 78,570 gallons,
Alcohol..... 82,840 "

The assessment, however, was made by his direction for a deficiency of 80,578 gallons, which, at $2, makes $161,156 as the amount of taxes due the government. This sum is yet due, and is for taxes on the alcohol. The taxes on the high-wines having been fully paid, the lien as to them is discharged.

The returns rendered seem to have been made fairly enough of the high-wines manufactured. The barrels into which the liquors were run were duly inspected and the taxes paid. The inspector's marks were placed on the barrels, the amount inspected reported, and receipts given on the payment of the taxes.

The fraud consisted in eluding the notice of the officers as to the alcohol, and it appears to have been manufactured and taken from the distillery without the knowledge of the revenue officers, who, however honest, as they are reported to be, have certainly been wanting in vigilance.

The liquors consigned to Sturges Sons appear to have been shipped in forty-two bills of lading, most of which have been exhibited, under dates from January 10 to April 15, 1865. This firm advanced, as appears by the affidavit of Julius K. Graves, who states that he acted as agent of the firm, the sum of $258,000 on bills of lading forwarded from time to time, and the Branch Bank at Dubuque advanced $14,382.60 on bills of lading of wines and alcohol which appear to have been shipped to Rowe & Co., New York. This includes $33,946 which was paid by West Dexter, esq., for Sturges Sons, immediately after the first seizure was made. Hearing of the seizure, he was sent by his clients to Dubuque to ascertain what the trouble was, and there ascertained, as he supposed, that they were $33,946 in arrears for taxes due from Rhomberg & Co., for the payment of which time had been given by the deputy collector, and on being assured by that officer that no more was due, and on that being paid the distillers would "stand straight," he paid the money.

The high-wines and alcohol having been seized, one of the firm of Sturges Sons, accompanied by Mr. Allison, M. C., and one of a law firm in Dubuque, who had been employed by the government in the case, Mr. Dexter and Mr. Graves visited Washington and stated the facts, in all material respects, as above narrated, to the Secretary of the Treasury, and afterwards had an interview with me, in which the statement was repeated.

The Secretary of the Treasury was properly impressed with the hardships of forfeiting goods in the hands of persons who had removed them fairly in the ordinary way of trade, and had advanced on them to their full value; and he considered that while the severest penalties were due to the persons guilty of the fraud, it was not for the government to treat with severity honest dealers acting with ordinary caution according to the usages of trade. I concurred entirely in this sentiment; and as the seizure might operate prejudicially to the credit of the bankers, even to their ruin, during the pending of the proceedings, it was suggested by Mr. Allison that the liquors should be released to the parties applying, the Sturges Sons and the Dubuque bank, upon their giving a satisfactory bond, and that the question as to the continuance of the lien which the government originally had upon the liquors should be submitted to the final determination of the Commissioner of Internal Revenue. This proposition involved a waiver of the forfeiture by the government, and was a compromise between the government and the parties. The proposition being acceptable to me, and consistent with my views

of justice, was submitted to the Secretary of the Treasury and approved by him. The parties accordingly gave bond, and the case is now before me under the arrangement for consideration and decision.

After some little time had elapsed I addressed a letter to Collector Fuller, and one also to Sturges Sons, informing them that I wished to dispose of this case, and requesting that the evidence should be taken. Before those letters could have reached their destination, Mr. Dexter, the counsel of Sturges Sons, appeared with certain affidavits tending to show that prior to the advances being made by the Branch Bank and the firm of Sturges Sons, those parties, by their agent at Dubuque, inquired of the deputy-collector who collected the taxes of Rhomberg & Co. whether those distillers were paying their taxes as they accrued, and that that officer answered that they were; and also that on several occasions the same question was asked and the same answer given.

Mr. Dorsheimer, who was one of the counsel that had acted for the government officers making the seizure, and who represents in this hearing the interests of the informer, appeared about the same time with Mr. Dexter, and desired a continuance of the case, alleging that he believed that he would be able to prove that the Sturges Sons were implicated with Rhomberg in his fraud. He stated that he wished to examine Mr. Rhomberg as a witness, and also to obtain copies of the letters which had passed between Rhomberg and David Dows & Co. and expected to obtain evidence of fraud from those sources. Although the application had but very slight support, and perhaps of questionable propriety, I was disposed to favor it, as the proof, if it could be adduced, was important, and particularly as the proceedings in the case had not been and could not be conducted with legal formality. A suggestion was made that the testimony of Rhomberg might be taken on interrogatories, and that copies of the letters written to Dows & Co. might be furnished by Dows himself direct to me, without being verified by oath. The suggestion was adopted, Mr. Dorsheimer filed interrogatories, and the case was continued till the 26th instant.

It was stated at this interview that Mr. Graves, who had been the agent of Sturges Sons at Dubuque, was expected here on Saturday. I stated that when he arrived I would examine him myself, in the presence of the counsel, if they chose to be present.

The next day I left Washington, to be absent for three days. Within a short time after I left Mr. Dorsheimer applied to the Secretary of the Treasury for a further continuance of the case, in consequence, as he alleged, of a statement in a confidential letter addressed to this office by a revenne agent, which had been exhibited to him. This statement was of a report, of the truth of which a witness, known to be on the ground at the time, could

testify. The Secretary, not aware of that fact, nor not considering probably that the case was before me, as a referee, gave him to understand that the case would be continued. Being disposed to accommodate my proceedings to the wishes of the Secretary, and to hear everything that could be presented on either side, I have kept the matter open to the present time. Meanwhile I have taken testimony of Mr. Graves and of William Sturges, neither of whom appear to have any interest in the question. The deposition of Mr. Rhomberg has also been received, as well as copies of the correspondence between Sturges Sons and David Dows and Company. Mr. Graves acted as vice-president of the Dubuque Bank, and also as agent of Sturges Sons in making advances for them to Rhomberg. He establishes the same facts as those stated in the affidavits referred to, though with more definiteness and particularity, and alleges that he neither knew nor suspected that any fraud was practiced by Rhomberg, who, previous to the closing of his distillery by the revenue officers, had borne a good character.

The correspondence of Sturges Sons with David Dows was called in by the suggestion that it might contain some indications of a knowledge of the fraud, but no trace of such knowledge is made manifest by it. The testimony of William Sturges, delivered with great appearance of candor, proves that he never saw Mr. Rhomberg during the time the advances were being made by the firm; that he had no correspondence with him; that he had never been at Dubuque, and that he had left the management of the whole business in the hands of Mr. Graves. The deposition of Mr. Rhomberg himself is substantially to the same effect. So far, then, as the case has gone, not only does no evidence of fraud on the part of Mr. Graves or the Sturges Sons appear, or of their complicity with Rhomberg, but the proof is very strong to the contrary.

Although Mr. Dorsheimer has not yet appeared, having gone, immediately after having obtained, as he supposed, a continuance of the case, to Buffalo and Dubuque, I shall now proceed to consider the case.

All the evidence that can be legitimately heard has been presented, and as my term of office is about to expire, it was his duty, if he had anything to exhibit or to say, to be here. He knows that this hearing must be terminated on or before the first of July, and he cannot expect me during the last hours of my official life to be able to command that deliberation which the importance of the subject demands. If, however, after having considered the question of law that arises in the case, he shall appear and wish to be heard, I will hear what he has to say, and if it shall be of weight to affect the merits of the controversy, I will give him the benefit of it; provided, however, that my term of office shall not have expired.

The lien of the tax is imposed by the 55th section of the act of June 30, 1864. By that section, the duty of $1.50 a gallon is imposed on all spirits distilled prior to February 1, 1865, and by the amendment of the act, passed on December last, a duty of $2 a gallon is imposed on all spirits distilled on and after the first day of January, 1865, "and said duties shall be a lien on the spirits distilled, and on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the said distillery is situated, *until the said duty* shall be paid."

This is a statutory lien, and the condition of its discharge is given. *That condition is payment.* Here it is clear that payment was not made. Can anything be substituted for such payment, or be deemed equivalent for it?

It is contended by the counsel of the Messrs. Sturges that the proper officer of the government whose duty it was to collect the taxes on the spirits manufactured by Rhomberg, having represented to the agent of a banking firm about to advance moneys on the security of spirits about to be consigned to his principals that the duties were paid on the spirits manufactured, the government cannot allege, after the bankers have advanced their money and taken the spirits, that the officer was mistaken in his statement. The counsel insists that his clients having acted in good faith, the government is bound as far as they are interested to take the fact to be as represented, and the lien must be considered as to them to be discharged.

There is no doubt that if Collector Eighmay had been the owner of the spirits, and had stated to a person about to purchase certain spirits, or to make advances on them, that he had no claim on them, and that he might purchase or advance without risk, there is no doubt that he would be estopped from setting up a claim adverse to the right of one acting on the faith of his statement by purchasing or advancing.

It is also very certain that if the collector had given a receipt for the taxes due on a lot of spirits, and the bankers had advanced on the spirits described in the receipt on its being exhibited, believing it to be true, and it turned out afterwards to have been given by mistake, the government would have been bound by the act of the collector, and the lien would have been discharged. United States *vs.* Bevin Crabbe, 324.

If an agent, whether of a commercial house or of the United States, acting within the scope of his authority, makes any statement to the prejudice of his principal, his principal is bound by it, even though the statement be untrue, if a party was induced by the misrepresentation to part with his money, and any claim of the principal in opposition to interests so acquired will be postponed. This is going quite as far as any decision of the courts has yet gone, in admitting that the interests of a princi-

pal, when it happens to be the State, can be affected by the mistakes of an agent. But the case in hand is different from all these. It wants the essential fact that the public officer was empowered to make the representation stated by Mr. Graves. His commission conferred certain powers which are defined in the act, but that of declaring what taxes were paid, and what not, except in the way of giving official discharges for those that were due, is not one of them.

The communication, such as it was, was gratuitous, and Mr. Graves took the risk of its being correct when he acted upon it. Nine times out of ten he would not have been misled, for nine times out of ten the collector would have been able to give and would have given accurate information. But it unfortunately happened in this case that the collector was himself deceived.

Had he acted fraudulently he might have been obliged to respond in damages to the parties injured, not as an officer, but personally. His integrity, however, is not impeached, and though he may have been negligent, that is not a ground of just complaint against him by any other than the government, whose agent he was. His negligence gives no substantive cause of action against the government in favor of those who, having no direct dealings with him, trust his answers to inquiries which he might have refused to respond to without a dereliction of duty. It is easy to see that if the law was otherwise the United States might be largely prejudiced by the incautious declarations of their public officers, assuming to give information on subjects upon which the law does not make it their duty to be informed.

The case of Lee *vs.* Munroe & Thornton, 7 Cranch, 367, appears to me to be in point. There the plaintiff was misled in making an important purchase, for which he paid the contract price, by the declarations of public agents who afterwards refused to convey the title for which he had contracted, on the ground that they had been mistaken in their declarations. It was determined, after full argument, that they, as public agents, were not bound by their mistaken declarations. It is my opinion, therefore, that the lien of the United States for the taxes remaining for the alcohol is not discharged.

There is no question made here as to the time the lien attached, nor whether the possession of the spirits, before the taxes became due by the factors who made advances upon them, gave them priority of lien, or prevented the lien of the United States from attaching. It is not, therefore, necessary to discuss these points, and I have passed them by, taking it as conceded that unless the lien of the United States was affected by the declarations of its officers, its hold on the alcohol is undisputed.

But the case has other features which it is proper now to consider. As I have already stated, the unpaid dues are a lien, first,

*on the spirits distilled;** second, on the distillery used for distiling the same; third, on the stills, vessels, fixtures, and tools therein; fourth, on the tract of land whereon the said distillery is situated.

In order to obtain a hold on other property, not mentioned, it was necessary for the government to proceed to ascertain the amount of the duties due, and to cause a warrant of distraint to issue. Such proceeding was had, the amount of duties ascertained, and a warrant issued under which a large quantity of lumber, grain, cord-wood, live stock, and other property was levied upon. The grain was rapidly heating and spoiling, and the government officers, in order to save it from being utterly lost, have continued, since the seizure was made, to run the distillery for the purpose of converting the grain into a marketable article. This was not done at my instance, or by my order. I certainly should not have given such order. On all this property distrained, whether as distrained or in its new shape as converted, as well as on that described in the 55th section, the government has now a valid lien.

Subject to the lien of the government, Sturges Sons have a lien on the alcohol delivered to them, on which they made advances. Those advances, according to the testimony of Mr. Graves, amount to the round sum of $258,000. Under the circumstances stated, if they were to pay the prior lien of the United States, or if that lien were otherwise discharged, they would be entitled to the possession and control of the alcohol against all other claimants, the right of forfeiture being relinquished.

Here, then, the United States have a lien on the alcohol and all other property of the defendant described in section 55, or seized by virtue of the warrant of distress. The Sturges Sons have a lien on the alcohol only.

The United States, through a sovereign power, in dealing with citizens and subjects, hold themselves bound by the rules of law and equity applicable to the particular circumstances.

If the parties to this case were private persons, the United States would be bound to pursue its remedies against all that property on which the Sturgeses have no lien before they could resort to the alcohol; or, at least, the Sturges Sons would be entitled to be subrogated to the rights of the United States, and put in their places as to the property under distraint, and also as to that covered by their statutory lien under section 55; for it is an admitted and universally recognized principle of equity, that when one party has a grasp on two funds, and another has a grasp on one of those funds only, the first must exhaust his remedies against that fund on which the last has no hold, or allow him to be subrogated to his rights against that fund, unless, indeed, there is some interfering equity in some third person, which does not exist here.

* Only since April 1, 1865.—W. T

One of the parties being a sovereign state makes no difference as to their rights, nor as to principles on which these rights will be adjusted. Such being the case, I consider that the government is bound, according to the equitable rule which I have stated, to proceed to make its taxes out of the property which it holds under seizure before it can call on Sturges Sons to pay the taxes due on the alcohol. If, after a sale of that property, there shall be a balance of taxes due, Sturges Sons will be obliged to pay that balance or redeliver the alcohol.

It will be perceived that I have thrown out of the question the mortgage of the Sturges Sons on the estate, real and personal, of Rhomberg. I have supposed that that mortgage, having been given after notice of the fraud of Rhomberg, would be of no validity as against the United States, being subject obviously to the objection that its object was to hinder or delay the United States in the prosecution of their claim for taxes. So far as concerns the personal property, of which Rhomberg retained possession, it would also by the common law be void as against creditors, and I have been shown nothing in the statute law of Iowa that would obviate this objection. It is good, however, against Rhomberg; and if, after the United States shall be satisfied, there shall be anything left, the balance may pass under that instrument to the mortgagees. But, whatever may be the effect of the mortgage, it is very clear that Sturges Sons, being the bona fide holders of the alcohol for a full consideration, have a right to retain it unless the United States has a better right to it; and if the property in their hands by virtue of the warrant of distraint is sufficient to pay the taxes, it cannot be justly or legally taken to pay them.

The value of the property distrained has undergone some change since it passed into the hands of the officers of the United States. Some of the grain has been converted into liquor, and the liquor will probably sell in the market for more than the grain. I do not consider that such a fact affects the rights of the parties. If the value of the property had depreciated in the hands of the government officers through their negligence, it might have been a question whether the United States would not have been chargeable with the loss in adjusting the balance of the responsibilities of Sturges Sons. If there had been a loss caused by inevitable accident, or if it had occurred without negligence of the officers in charge of the property distrained, the burden of it might have fallen on the owners of the alcohol; they were in such a situation that they could not well escape a liability to suffer in this way. Fire, or flood, or a fall in prices, might have reduced the value of one of the liens held by the United States as security for their claim, and thus compelled them to draw more largely on their other security. While thus liable to loss from the causes stated, and from others of a like

nature, Sturges Sons might, on the other hand, be benefited by any additional value which might be imparted to any subject of the lien of the United States for taxes other than that in the hands of the firm; and if the property distrained has become more valuable than it was when distrained, the benefit accrues to them.

The United States cannot sell the spirits their officers have made out of the material distrained in any other way than free of taxes; and if they have enough of it to bring the amount of the taxes due on the alcohol at public sale, the alcohol must be held to be discharged of the lien. How the fact may turn out can only be determined on trial. It will be for the interest of the Sturgeses to see that, on the sale of the distrained property and its product as converted, the proceeds shall be sufficient to satisfy the claim of the government.

If it shall happen that the distrained property shall prove more than enough at sale to pay the debt due to the United States for taxes, the sale ought not to proceed, unless under some arrangement or compromise beyond what the payment of the debt and costs may require. The balance of the property will belong to Sturges Sons, or to other creditors of Rhomberg.

On the whole matter, then, my decision is, that the lien of the United States on the alcohol assigned on account of Sturges Sons by Rhomberg & Co. was not discharged by the circumstances stated, but that the bond above mentioned, given by Sturges Sons and the Bank of Dubuque, with their sureties, being substituted for the lien, binds the obligors for the payment of the duties due on the specific articles; that the amount for which these obligors will be indebted to the government, if indebted at all, will be the balance remaining after the proceeds of the sale of all the property distrained upon by the officers of the United States shall have been applied to the payment of the taxes.

I further decide that it is the duty of the United States to proceed, without delay, to make sale of the property so distrained upon as aforesaid, and to apply the proceeds over and above the proper costs and charges of the distraint and sale to the payment of the taxes due to the United States, and in relief of the obligors in the bond.

JOSEPH J. LEWIS,
Commissioner.

JUNE 30, 1865.

B.

TREASURY DEPARTMENT,
Office of Internal Revenue, Washington, July 3, 1865.

SIR: I have the honor to transmit herewith a decision of my predecessor in what is known as the "Rhomberg case," which I find among the papers on my table.

Having no other knowledge of the facts than such as are derived from this paper, I assume its statements in that regard to be correct; but I am constrained to dissent from the conclusions to which its author arrives, in the following particulars, viz:

1. The United States had no lien on either the alcohol or high-wines consigned on account of Sturges Sons for the taxes due thereon by Rhomberg, for the sufficient reason that such alcohol and wines were all produced prior to April 1, 1865, on which day the act of March 3, 1865, which first made the tax a lien on distilled spirits, took effect. Any interest which Rhomberg had therein, beyond the advances made by Sturges, could have been reached under distraint as the property of Rhomberg without the lien.

2. The proceedings against the property consigned by Sturges Sons were not for the recovery of taxes due thereon, but for forfeiture on account of fraudulent practices by its producer, which being proved or admitted, gave the United States the right to forfeit such property wherever found.

3. Sturges & Sons were not indebted to the United States for taxes which had accrued upon spirits produced by Rhomberg. They could not be required to pay nor to give security for the payment of such taxes. I am of opinion, therefore, that the bond executed by Sturges Sons, not being given to secure a debt due by them, nor authorized by law, was invalid, and hence not a proper consideration for the delivery to them of the alcohol and high-wines seized at New York, Buffalo and Chicago; and that its acceptance by the officers of the United States, being an extra official act, was not "a waiver of the forfeiture by the government."

4. The right to forfeit property tainted with fraud is independent of its liability to be distrained for tax; and after this right is exhausted against such property, by whomsoever holden, the collection of the taxes due by the perpetrator of the fraud may be enforced in like manner as if no forfeiture had been had. The proceedings in this case, therefore, against the spirits in the hands of Sturges & Sons and their agents and consignees, have necessarily no connexion with, nor are they influenced by, the action of the collector at Dubuque.

I beg to say, in conclusion, that notwithstanding the difference between my views and those expressed by my predecessor, under the peculiar circumstances surrounding this case, if a satisfactory compromise of the whole matter is proposed, I am inclined to recommend its acceptance.

Your obedient servant,

WILLIAM ORTON, *Commissioner.*

Hon. H. McCULLOCH, *Secretary of the Treasury.*

C.

WASHINGTON, *June* 26, 1865.

SIR: In view of the delay in the decision of our case before you, resulting, as we are informed, from a necessary investigation of certain legal questions, we beg respectfully to offer as terms of immediate and final settlement the following compromise:

The United States to convey to us the distillery and contents, also property of every kind, seized or held as security for the default of J. A. Rhomberg & Co., and to assign to us the bond of Graves and Greenwall, sureties for Rhomberg & Co., and to cancel our bond for submission of the case to the Commissioner of Internal Revenue, and to deliver said property to us free from all claims of the United States for taxes, penalties, or forfeitures. Or, in case the Commissioner shall think that the United States cannot sell this property at private sale, we agree that in case it be sold at public sale, as soon as the law will permit, that the property shall bring at such sale the sum of $161,363, and any further sum not to exceed $10,000, that may be adjudged by yourself as properly due to informers for services. In case we become the purchasers, we propose to pay $50,000 cash, $50,000 in ninety days, and the balance in six months, on such security as shall be approved by the Secretary of the Treasury. In case we become purchasers of only a part of the property sold, we will pay at the same rate as above stated for the part we purchase. Whatever the property may bring at such sale to belong to Sturges Sons, after paying the government the tax and additional sum to be paid the informers.

SOLOMON STURGES SONS,
DUBUQUE BRANCH BANK,
By WIRT DEXTER, *their Attorney.*

HON. JOSEPH J. LEWIS, *Commissioner of Internal Revenue.*

D.

WASHINGTON, *July* 26, 1865.

In the Rhomberg case we beg leave to submit the following proposition of compromise:

We to pay for all the property seized by government at Dubuque, (excepting wines made since seizure of the distillery,) the sum of seventy thousand dollars, ($70,000,) receiving from the government on account of said sum a credit of $54,814, being estimated cost of material and amount of money consumed in making wines since seizure. All wines and alcohol not heretofore released, to be so. Our bond of submission to be cancelled.

Also, Rhomberg's bond to be assigned to us. Wines manufactured since seizure to be the property of the government.

SOLOMON STURGES SONS,
DUBUQUE BRANCH BANK,
By WIRT DEXTER, *Attorney.*

Hon. WILLIAM ORTON, *Commissioner Internal Revenue.*

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
WASHINGTON, *May* 1, 1865.

Hold all property seized. Run distillery to save perishable property, and feed cattle.

JOSEPH J LEWIS,
Commissioner.

Charge this office.

O. F. PRESBREY,
Special Agent, Dubuque, Iowa.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
WASHINGTON, *May* 6, 1865.

If owner does not give bonds let cattle be sold, if you can't feed them advantageously. See proviso to section 48.

JOSEPH J. LEWIS,
Commissioner.

Charge this office.

OTIS F. PRESBREY, *Lyons, Iowa.*

E.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
WASHINGTON, *July* 27, 1865.

SIR: I have the honor to transmit herewith a proposition made on behalf of Messrs. Sturges Sons, of Chicago, Illinois, for a settlement of the claim of the government against Messrs. Rhomberg & Co., of Dubuque, Iowa.

Although this case was reported to you by my predecessor, and all the papers relating thereto are now on file in your office, I understand it to be your wish that I should advise as to the propriety of making a settlement, and the terms which, in my opinion, it will be proper for the government to accept.

I assume, first, that the Messrs. Sturges are innocent of any complicity with the fraud of Messrs. Rhomberg, and therefore are not liable to proceedings for penalties.

2d. While there is no evidence of the existence of a copartnership between him and them in the distillery business, based upon written agreements, yet that their business relations were of such a character and so interwoven as to make them jointly and severally responsible for the duties accruing to the government upon spirits produced by Rhomberg through the assistance and the capital of Sturges.

3d. That the property of Rhomberg is insufficient to pay the taxes due to the government at the time his fraud was discovered.

If these were the only facts in the case, I should have no hesitation in advising a settlement upon payment by Sturges of the sum due, and permitting them to take the place of the government towards the property of Rhomberg, now under seizure; but a most unfortunate complication of the case has arisen since the seizure, from the actions of the revenue officers at Dubuque, authorized and approved by my predecessor.

Among the property seized for taxes was a large quantity of grain, malt, materials for manufacturing barrels, and coal for driving the engines at the distillery.

Upon representations that the grain was heating and becoming spoiled, my predecessor authorized the officers of the government in charge of the distillery to convert this material into spirits, and into packages for containing the same; the moneys required to defray the current expenses for labor, &c., have been advanced to those officers by the bank at Dubuque, in which the Messrs. Sturges have an interest. The result of these operations has been the production of about 75,000 gallons of spirits, worth in that market at this time but little more than two dollars per gallon.

The first question which is now presented is, Who owns these spirits? If they belong to the United States, it is clear that the proceeds arising from their sale should be applied to the payment of what I hold to be the joint debt of Rhomberg and Sturges; but in that case the sum received will consist almost entirely of a value arising from a liability to tax, which tax will not have been paid; for in a sale made by the government of its own property there can be no reservation of a subsequent interest to accrue to itself. If these spirits are not the property of the government, then they must belong to Rhomberg or to Sturges, and not having been levied upon at the time of the distraint, and no fraud having been committed in their production, they are not now liable either to distraint for duties or to proceedings for forfeiture, and must, therefore, be delivered to the owners, who in that case would be obliged to pay, or secure to be paid, the duties accruing thereon. But the difference between the market value of these spirits and the amount which would be due thereon for taxes is so slight that all the materials used in their production, and all the moneys expended for labor, &c.,

will prove a total loss—the former to the government, and the latter to the Messrs. Sturges.

To return to the question of ownership: There is no provision of law known to me which will afford a satisfactory answer to this question. After careful consideration, however, and notwithstanding my strong inclination to secure for the government its just dues under all circumstances, I come reluctantly to the conclusion that these spirits, produced since the seizure by the government out of its own material—upon the credit of its officers—are now its property. If you concur in this opinion. it is not material whether we accept the former proposition of Messrs. Sturges, or the one herewith transmitted, excepting, perhaps, that in the latter case the excess above the sum due for taxes, and which would be treated as in lieu of fines and penalties, would probably be larger than in the former. I suggest, therefore; a modification of both propositions to this effect: that upon payment of the taxes assessed, and of all costs properly chargeable which have accrued, and a further sum of twenty-five thousand dollars in lieu of fines and forfeitures, that all the property now under seizure at Dubuque and elsewhere be turned over to the Messrs. Sturges, and that the bond executed by them to my predecessor be cancelled and surrendered.

I am constrained to say, further, that the government would derive but small actual benefit from this settlement. It substantially applies $150,000 of value accruing for taxes which have not been paid to the extinguishment of an indebtedness of like amount for taxes fraudulently withheld.

The great error on the part of the government was committed when it undertook to convert the grain into spirit. There was no warrant for that proceeding either in law or necessity. The fact that private parties are to derive benefit from the errors of government officers will not justify, however, a repudiation of their acts.

I take the liberty to add that no person has any knowledge whatsoever of the views hereinbefore expressed, and that no copy of this communication will be filed in this office until after it has been considered and approved by you.

I have honor to be your obedient servant,

WM. ORTON, *Commissioner.*

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

J. D. Dick

DORSHEIMER'S CASE.

PHILIP DORSHEIMER AND OTHERS *vs.* THE UNITED STATES.

On demurrer.

A large amount of distilled spirits, and the distillery and appurtenances where the same was manufactured were seized at the instance of, and upon information furnished by officers of the internal revenue. Judicial proceedings were instituted to have the spirits declared forfeited. During the pendency of these suits, and before condemnation, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, compromised the case, the claimants of the property paying the amount of taxes due on the spirits, and a specific sum as penalties.

1. The act of the 30th June, 1864, § 44, authorized the Commissioner and Secretary to make the compromise.
2. That in agreeing to such compromise it was competent for them to make the payment of the taxes due the United States a part of such compromise.
3. That the amount so received for duties, on such compromise, was not reserved as a forfeiture out of the property, but paid as a tax, and the informers were not entitled to participate in such sum.

Nott, J., dissenting.

CASEY, C. J., delivered the opinion of the court.

This case comes before us on a demurrer, which admits the facts as stated in the petition of the claimants, but alleges they are not sufficient in law to maintain their action. We need not, therefore, recite the facts.

The solicitor contends, in support of the demurrer, that the compromise of the suit by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, as set forth in the claimants' petition, is binding upon them, and conclusive of their rights in the premises. That the act of 30th June, 1864, § 44, which conferred upon the Secretary and Commissioner the right to compromise all suits relating to internal revenue, is broad enough in its provisions and scope to embrace this case. That until the actual receipt of the money, and while proceedings remain in *fieri*, the Secretary and Commissioner may interpose their authority and defeat the forfeiture by remitting the penalty or compromising the suit.

The claimants' counsel contend that when the property was seized for violation of the excise law it was no longer liable for tax as such, but subject to forfeiture only; and, therefore, that in the alleged remission of the forfeiture or compromise of the suit, whatever sum was obtained by such arrangement, could only be so much reserved out of the forfeiture as a penalty and not as a tax.

If these sums were really penalties or forfeitures and not taxes it is admitted the claimants are entitled to share equally in their amount with the government. The internal revenue law gives one moiety of these to the informer. If, on the other hand, the amount in dispute was received by the government as taxes due from the party whose

property was seized, and the officers had a right to so compromise the suit, then these claimants have no right to participate in the amount representing such taxes or duties.

The claimants rely on the ruling of the Supreme Court of the United States in the case of McLane *vs.* The United States, 6 Pet., 404, as decisive of this controversy. That case arose out of the seizure of a cargo of goods imported into the United States in violation of the non-intercourse laws, about the month of April, 1812. They were libelled, and a decree of condemnation passed. Congress then, on the 29th July, 1813, authorized the Secretary of the Treasury to remit the forfeiture on payment of the duties which would have been payable by law on such goods, &c., if legally imported after the 1st of July, 1812. An act of Congress of that date had rendered such goods liable to a double duty. The Secretary of the Treasury, proceeding under this special act, remitted the forfeiture upon the conditions prescribed therein. The money was paid into court, where the forfeiture had been declared, and the collector, Mr. McLane, claimed a moiety, and prayed that it might be decreed to him. His prayer was refused, and he appealed to the Supreme Court of the United States.

Mr. Justice Story, after reciting the leading facts of the case, states the questions presented in the following concise and lucid manner: "The question then arises, in what light the reservation and payment of the double duties as conditions upon which the remission is granted, are to be considered? Are the double duties to be deemed a mere payment of lawful duties, or are they to be deemed a part of the forfeiture reserved out of the proceeds of the cargo? If the latter be the true construction, then the collector is entitled to a moiety; if the former, he is barred of all claim."

The claim of the collector was sustained on the ground that the goods when imported and seized were not liable to duties at all, they were simply subject to forfeiture. And the object of the act of 1813, authorizing the Secretary to remit on payment of double duties, was a mere means of determining the extent to which the forfeiture should be enforced. The goods not having been subject to any impost or tax, it could not be retained as a duty, but must be regarded as a forfeiture. The government in that case admitted the right of the collector to participate in one half the sum received, regarding the single duty as a tax and the residue as forfeiture. But the court held the entire proceeds to be a forfeiture, and decided that the collector was entitled to a moiety of the whole sum.

Now the claimants maintain that after this property was seized and libelled it was no longer subject to tax; that the only way in which the government could get any sum out of it in lieu of the taxes, the payment of which had been evaded by the manufacturer, was by a decree of condemnation and sale, or by reserving so much out of it, on releasing the property or compromising the suit, by way of forfeiture; that from the time of seizure till the close of the case the interests of the government and the informer are identical and mutual, and they are entitled to share alike in all that may be obtained out of the property seized, whether by compulsion or compromise. They admit

the power of the Secretary to remit the forfeiture, but say it must be an entire remission. He may not remit the part to which the informer is entitled, and retain the government's share or any part of it.

The right of an informer in the property seized is an inchoate right, and which, under our system of revenue laws, is liable at any time before the receipt of the money to be defeated by the intervention of the discretionary powers vested by law in the officers of the Treasury Department.

In the case of the United States *vs.* Morris, 10 Wheat., there had been judgment on the forfeiture, a decree of condemnation, and also judgment on the bond given by the claimant for the release of the property, a part of the money paid and distributed, a *fieri facias* levied on the goods of the defendants for the residue, and a *venditioni exponas* in the hands of the marshal to sell the same. At this juncture an application was made to the Secretary of the Treasury, who remitted the forfeiture, and his right and power to do so were the questions discussed and decided by the court.

Mr. Justice Thompson, in delivering the unanimous judgment of the court, says:

"It is not denied that custom-house officers have an inchoate interest upon the seizure, and it is admitted that this may be defeated at any time before condemnation. But if this is not the limitation put upon the authority to remit by the act giving the power, it is difficult to discover any solid ground upon which such limitation can be assumed. If the interest of the custom-house officers before condemnation is *conditional* and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest as against the claimant. Those officers, although they may be considered parties in interest, are not parties on the record; and it cannot with propriety be said that they have *vested rights* in the sense in which the law considers such rights. Their interest still continues conditional, and the condemnation only ascertains and determines the fact on which the right is consummated should no remission take place." And on page 291, speaking of the statute which gives the Secretary of the Treasury the power of remission in cases of forfeiture, he says: "But the plain and obvious interpretation is, that the right does not become fixed until the receipt of the money by the collector."

The object of the law is doubtless to secure the payment of the tax and not to produce forfeitures. The wide discretion vested in the officers is intended to assist them in collecting the duties and taxes, and to compel parties to deal justly by the government. The 48th sect. of the act June 30, 1864, 13 Stat., 240, enacts "That all goods, wares, merchandise, articles, or objects on which duties are imposed by the provisions of law, which shall be found in the possession or custody, or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of duties, may be seized by any collector or deputy collector who shall have reason to believe that the same are possessed,

had, or held for the purpose or design aforesaid, and the same shall be forfeited to the United States." The 41st sect., 13 Stat., 239, provides, "and where not otherwise or differently provided for one moiety thereof shall be to the United States and the other moiety thereof to the use of the person, to be ascertained by the judgment of the court, who shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred." The 179th sect., 305, makes it the duty of the several collectors of internal revenue, within their respective districts, to prosecute for the recovery of fines, penalties, and forfeitures imposed by the act, and that all such sums may be sued for and recovered in the name of the United States in any appropriate form of action before any circuit or district court of the United States for the district within which the fine, penalty, or forfeiture may have been incurred, or any other court of competent jurisdiction. And where not otherwise provided for "one moiety shall be to the use of the person who, if a collector or deputy collector, shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture shall have been incurred, and the other moiety to the use of the United States."

The 44th section of the act, 13 Stat., 239 and 240, enacts, "that the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, shall be, and is hereby, authorized, on appeal to him made, to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all duties that shall appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, and also repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them, or any of them, in any court for any internal duties or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done in the due performance of their official duties; *and also compromise such suits and all others relating to internal revenue.*"

The 1st sect. of the act of 3d March, 1797, 1 Stat., 506, it is admitted, confers full power upon the Secretary of the Treasury to remit any forfeiture incurred in cases like the present. But the act requires that the application for the remission shall be made to the judge of the district where the forfeiture accrued, who, upon notice to the district attorney, and the person claiming the forfeiture, &c., hears the application in a summary manner and reports the facts to the Secretary of the Treasury; the latter, if satisfied that the penalty or forfeiture was incurred without any wilful negligence or intention of fraud, may mitigate or remit it, or any part of it. This act can have no bearing on the present case, because the mode prescribed was not pursued, and without that he could not proceed under it.

The case depends, therefore, entirely and squarely upon the construction to be given to the provision in the 44th section of the act of 30 June, 1864, authorizing the Commissioner of Internal Revenue,

subject to regulations prescribed by the Secretary of the Treasury, to compromise all suits relating to internal revenue.

The statutory interest of an informer or prosecutor in a penalty or forfeiture under the revenue laws is only an inchoate and a contingent interest, and never vested and indefeasible until the money is actually received by him. This is the understanding and tacit agreement under which he enters upon the prosecution of the case. His individual interests must yield to the general policy and convenience of the government; the only limitation upon this, is that he shall be admitted to share, equally with the government, in the penalty or forfeiture recovered or reserved, in the final disposition of the case. Such are the results of the cases settled by the highest judicial authority, the Supreme Court of the United States. This, then, narrows the question in our case down to the simple inquiry whether the sum of one hundred and ninety-five thousand one hundred and two dollars, purporting to have been received on this compromise in payment of taxes due on the liquor manufactured, was really received as a tax or as a forfeiture. And this again depends upon the right and power of the officers under that 44th section; they intended to receive it as a tax, and if they had a right to do so, if they might lawfully claim the payment of the tax out of the property seized, or from the manufacturer or party claiming the property. then it is clear it was a tax and not a forfeiture. We think that Congress, in conferring this authority to compromise all suits, intended that the officers charged with the supervision of the assessment and collection of the internal revenue, and the enforcement of the law imposing it, should possess the fullest power and widest discretion. Instead, therefore, of the act enumerating and specifying the particular things which they might do, and to which their authority in that event would necessarily have been limited, they confer a power and right of control as broad and as extensive as the subject itself. It was of course apparent to Congress that in the workings of such complicated and vast machinery as that necessary for the assessment and collection of the internal duties imposed by the act of 1864, that no human sagacity or foresight could provide beforehand for the adjustment of the innumerable difficulties that would arise in any other way than in the most general terms. And while they were imposing on the Secretary of the Treasury and the Commissioner of Internal Revenue a most onerous duty, they intended to confer all the power necessary to perform it efficiently. It was apparent that much litigation would necessarily arise; that multitudes of suits, embracing every variety of judicial controversy, must ensue. That the subject-matter and complexion of this litigation would be as diversified in its aspects and character, in its facts and principles, as the endless variety and almost infinite number of objects and human transactions upon which the law was made to operate. To specify, to enumerate powers and functions applicable to such a subject, was simply impossible. The only thing that could be done to meet such exigencies as must arise was to confer the power in the broadest and most general terms. This, we apprehend, was the intention when Congress conferred the power to compromise all suits relating to internal revenue.

Compromise is defined to be "an agreement between two or more persons, who, to avoid a law suit, amicably settle their differences on such terms as they can agree upon."—(1 Bouv. L. Dict., 109.) Lexicographers define it in the same way. Webster says compromise is "an amicable agreement between parties in controversy to settle their differences by mutual concessions." To compromise: "To adjust and settle a difference by mutual agreement, with concessions of claims by the parties—to agree, to accord."

The suit compromised related to internal revenue. It grew directly out of, and was founded upon, the internal revenue law, and was a part of the machinery devised to enforce compliance with its provisions, as well as to punish for disobedience of its mandates. We have no doubt the power conferred embraced the right to compromise the suit in question, and being a matter of discretion vested by law in public officers, it is not re-examinable here. For a corrupt exercise of the power vested in them the officers would be liable to removal or impeachment. But no review of their action or appeal from their decision is given to any other tribunal. Therefore whether it was a wise and judicious settlement, whether in accordance with sound policy, and for the best interests of the service, are questions which do not arise in the case. Then, having made the compromise, and received a large sum in payment of the taxes admitted to be due, are the informers entitled to a share of those taxes? Does the seizure of the property and the pending suit for the forfeiture constitute such a partnership that the government must divide with them this sum paid to it expressly as taxes? The law confers upon them one half of the forfeiture—no part of the taxes, yet if a party comes voluntarily forward after seizure and pays the taxes, the government could surely receive them; suppose that occurs—they are paid over into the treasury of the United States. The suit for the forfeiture is still pending. The subsequent payment of the taxes does not condone the offence and operate as a release of the property; but the officers, at some subsequent period, agree to compromise with the owner upon the payment of a certain penalty, in lieu of the forfeiture, and restore to him the property. Does the act of compromise relate back to the receipt of the taxes, and make that a reservation out of the forfeiture which was in fact and in law, when made, a payment of taxes, and so regarded by the owner and the officers of the law? In such case the officers could receive the taxes—they were due as such, and if offered to be paid they could not be justified in refusing to receive them. But the receipt of those taxes does not take away or abridge their right to compromise the pending suit. That remains intact. And so far as that suit is concerned, their power over it is plenary and complete. They may reserve one dollar, or one hundred thousand, as a forfeiture or penalty. But whatever they reserve as such they must divide it with the informer. But that which is voluntarily paid to them as taxes goes into the public treasury, and the informer has neither lot nor part in the amount.

Between this case and McLane *vs.* The United States, 6 Peters,

404, there is a marked and wide distinction. In that case the goods never were liable to any tax or duty. They were subject to forfeiture, and to that alone. The United States could receive nothing from the owner or out of the property as a tax, for neither the one or the other owed any such. They had been brought into the country in violation of an act of Congress forbidding it, and rendering them liable to seizure and forfeiture; nothing else. His honor, Mr. Justice Story, states this as one of the grounds upon which the case rested: "In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods. They are not entitled to entry at the custom-house, or to be bonded. They are *ipso facto* forfeited by the mere act of importation. The 'Good Friend,' then, having arrived in April, 1812, long before the double duties were laid, and her cargo being prohibited from importation, it is impossible, in a legal sense, to sustain the argument that the importation could be deemed innocent, and the government entitled to duties as upon a lawful importation. It was entitled to the whole property by way of forfeiture and to nothing by way of duties."

Thus it will be seen that this whole case proceeds upon the ground that these goods never had been liable to any tax or duty. Not, as contended for by the claimants, in this case that, by the seizure, they only became amenable to forfeiture, and that fact took away the right of the government to insist upon the payment of the tax. If that cargo had been liable to duties, and their amount had been paid to the Secretary of the Treasury, as a condition without which he would not entertain the application, I do not doubt the decision would have been different, and his right to do so sustained; nor would the collector have been entitled to participate in their amount. The seizure of this property at the instance of the claimants did not release the owner from the payment of the duties. It did not absolve him from liability to punishment for his attempted fraud upon the revenue and evasion of the taxes. They remained a lien by the express provisions of the 55th section of the act of 1864, upon the distillery, the lot of land upon which it was situated, and all its appurtenances. *These* were subject to distraint and sale. *They* were seized and held by the government at the time of this compromise. The property thus held *exceeded in value* the amount of taxes received in that compromise, provided we include in our estimate the seventy-five thousand gallons of whiskey which the United States had manufactured out of the material on hand.

It would appear to me as a most lame and impotent conclusion, that with this vast power of remitting forfeitures under the act of 1797, and the still larger authority of compromise conferred by the act of 1864, that Congress should have denied to the officers of the revenue the power of compelling the owner or party claiming the property to do simple justice to the United States by exacting as a condition precedent the payment of the taxes due.

Take a case under the act of 1797. The goods seized were legally subject to a duty of 40 per cent. Upon a proper case presented, the Secretary is of opinion that the forfeiture was incurred without any

wilful negligence, or any intention to defraud. But the goods were liable to a duty of forty per cent. of their value. So much is fairly and legitimately due to the United States. No punishment ought to be inflicted on the owner, because the mistake was neither wilful nor fraudulent; yet the government ought to be paid the duties legally and fairly due. According to the theory of the claimants, if the officer receives the taxes, the informer is entitled to half of them; and the only way, therefore, they can get what is due the government is to make the owner pay eighty per cent. Either he is to be punished for an offence of which he is not guilty, or the government must lose one-half of what is admitted to be its just dues, for the benefit of the informer. But the law expressly says the Secretary may cause the prosecution for the recovery of the forfeiture "to cease and be discontinued upon such terms and conditions as he may deem reasonable and just." A payment of a tax or duty due from the applicant upon the very goods would be a most reasonable and just condition. And if he can do so under this act, he can, under the 44th sect. of the act of 1864. For the very power to make compromises *must, ex vi termini*, imply the right to fix, arrange, and agree to the terms and conditions of the settlement or adjustment of the suit. Looking then to the whole purpose and scope of these enactments, and regarding them as a part of a great revenue scheme, which can only be made effectual by vesting the largest power and broadest discretion in the principal officers entrusted with the administration and execution of the system, we think the power claimed and exercised in this case in making the compromise was fairly within the meaning and purview of the law; that the Commissioner and Secretary had a right to compromise this as a suit relating to internal revenue; that in agreeing to such compromise they had the right, and it was their duty to require as a condition of it that the taxes due the government on the property seized should be paid; that such sum was paid and received as taxes, and not as a sum reserved out of the forfeiture. And being taxes pure and simple, the claimants have no right to any part or portion of them; but that their right is limited to one-half the penalties or forfeiture reserved by the compromise as such. As upon the face of the petition the claimants have shown no cause of action, the demurrer is sustained and the petition is dismissed.

COURT OF CLAIMS.

MONDAY, JAN. 28, 1867.

PHILIP DORSHEIMER ET AL. vs. THE UNITED STATES.

NOTT J., dissenting.

From the statements made in the petition, I think these three chief and controlling facts appear.

1st. That all of the seizures were made and all the proceedings *in rem* were instituted by the government upon information given exclusively by the claimants, and that the claimants did first inform the officers making the seizure and instituting the proceedings "*of the cause, matter, or thing whereby the forfeiture of the property aforesaid was incurred,*" and that they were "*the first to discover and ascertain that said Joseph A. Rhomberg*" "*was engaged in the fraudulent practices*" of which he confessed himself to be guilty.

2d. That the property seized for forfeiture and relinquished in the compromise and settlement was worth the sum of $350,000.

3d. That the government received in settlement and compromise, of the seizures and proceedings instituted on the information of the claimants' the sum of $220,102, and that such sum of $220,102 was received exclusively as the direct consequence of the said seizures and proceedings, and was entirely the consideration of the said compromise.

In the case of *McLane vs. The United States*, 6 Peters 426, Mr. Justice Story sets forth the law of seizures and forfeitures as it existed then, and is admitted still to exist, thus:

"The duty of the collector in superintending the collection of the revenue, and in making seizures for supposed violations of law is onerous and full of perplexity. If he seizes any goods it is at his own peril, and he is condemnable in damages and costs if it shall turn out, upon the final adjudication, that there was no probable cause for seizure. As a just reward for his diligence, and a compensation for his risks, at once to stimulate his vigilance and secure his activity, the laws of the United States have awarded to him a large share of the proceeds of the forfeiture. But his right by the seizure is but inchoate: and although the forfeiture may have been justly incurred, yet the government has reserved to itself the right to release it either in whole or in part, until the proceeds have been actually received for distribution; and in that event and to that extent, it displaces the right

of the collector." "But whatever is reserved by the government out of the forfeiture is reserved as well for the seizing officer as for itself, and is distributable accordingly.

The case of *McLane* differs from the case at bar in this: The vessel and cargo "*were forfeited for a violation of the non-intercourse acts.*" But the act of 2d January, 1813, allowed the Secretary of the Treasury to remit the forfeiture on the "*payment of the duties which would have been payable by law on such goods, &c., if legally imported.*" The Secretary accordingly remitted the forfeiture "*upon payment of the double duties imposed by the act of the 1st July, 1812.*" Upon these facts the Supreme Court held that "*without question these acts of Congress were directory and mandatory to the Secretary,*" but that nevertheless "*in point of law no duties,* AS SUCH, *can legally accrue upon the importation of prohibited goods,*" and that "*the double duties are referred to* [by the act] *as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture; and not as a declaration on the part of the government that they were to be received as legal duties upon a legal importation.*" The case, therefore, turned upon the construction of the act of 1813, and is not a case absolutely in point. If the Supreme Court had been of the opinion that Congress intended the double duties to be reserved "*as such,*" and not by way of forfeiture they would have doubtless given effect to the statute, and held that it changed the existing law respecting the share of the collector. But although the case is not a case absolutely in point, it nevertheless involved a construction of the act of 1797, and called forth a clear and unequivocal declaration of the rights of persons making seizures under the laws of the United States, and a positive judicial annunciation of the policy of the government toward such persons, which is that "*whatever is reserved by the government out of the forfeiture is reserved as well for the seizing officer as for itself.*"

The case at bar does not involve a construction of the act of 1813, or of any similar act, but does come within the general principle annunciated by the Supreme Court, and does show that the acts of the collector and his associate officers were of a kind that entitles him to the benefits of the liberal and unvarying policy which has been pursued by the government toward its officers, and to the remuneration which the government has always accorded, through Congress, through its executive department, and through its judiciary, to those whose acts it has adopted, and through whose labors it has succeeded. These acts are set forth clearly in the report of the Secretary of the Treasury to Congress, February 5, 1866, which is made by reference a part of the petition. The Commissioner of Internal Revenue says, (report, Jan. 25, 1866:)

"Early in April, 1865, it was discovered that large quantities of distilled spirits were passing through Buffalo, shipped from some point or points west, to New York city, under circumstances which induced the belief that the law was being in some way evaded. The attention of Collector Dorsheimer and Assessor Presbrey, of the thirtieth district of New York, was called to the matter, and after examination they deemed it their duty to proceed to New York city to make the necessary investigation and ascertain the facts in the case.

"On the 17th of April Messrs. Dorsheimer and Presbrey reported from New York that they had found in the hands of A. L. Rowe & Co. 112 barrels, and in those of A. B. Warner 56 barrels; that a lot had also been found in possession of David Dows & Co., and 176 barrels on the dock. They added that all this property had been seized by Collector Dorsheimer, and, under the advice of the United States district attorney, passed over to the United States marshal. A large quantity was stated by them to be still on the way between Buffalo and New York, which would be seized upon its arrival.

"Messrs. Dorsheimer and Presbrey expressed the opinion that a fraud had been committed, but that it would require a thorough investigation at Dubuque, and advised that some one be sent there at once.

"Mr. Presbrey was thereupon directed by telegraph to proceed to Dubuque and to make the necessary investigation. * * *

"On the 24th April, Collector Dorsheimer seized at Buffalo 11 barrels of alcohol. * * * * * * *

"April 28, Mr. Presbrey reported that he had obtained satisfactory evidence of the fraud; that the deputy collector had seized the distillery with its appurtenances; about 50,000 bushels of shelled corn," &c., &c.

These facts show that the collector and his associates embarked time, money, and ultimate risk in the seizure, and that they did so on the faith of the general policy of the United States, to which, as I think, the 179th section of the internal revenue act conforms, and of which it is intended to be in furtherance. The petition then shows that the distiller confessed his guilt, and that the owners paid to the government for the relinquishment of this very property, and the discontinuance of the proceedings instituted for its forfeiture, the sum of $220,102, but that the government did not divide this sum with the claimants, and, on the contrary, appropriated all but $12,500 to its exclusive use. This division was based on what was termed a "compromise" of the suit or proceedings wherein $195,102 were said to be received as taxes on a part of the property relinquished, and $25,000 as forfeiture reserved of the same property. The remainder of the property, it may be noted, was released because it had been illegally seized, being liable to distraint and not to forfeiture.

If this disposition can be made of the avails of the proceedings *in rem*, based upon the collector's seizures and information, it is, I feel warranted in saying, the first case in the history of our revenue laws where perfect good faith has not been kept with the officers making the seizures; and where the government has received a greater share of the proceeds or result of the seizure than the party who instituted it, and at whose risk and through whose diligence it was prosecuted. That such a distribution must rest on something more substantial than the Secretary's calling the moneys, which he has retained, by one name instead of another is not disputed; but neither the reasons advanced nor the authorities cited afford, in my judgment, a sufficient ground to sustain the doctrine contended for; and I am compelled, therefore, to dissent from the conclusion of the court.

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The case of the *United States vs. Morris*, 10 Wheat., 246, is cited by the defendants. It decides nothing more than this: that the authority to remit the forfeiture is not limited to the period before condemnation or judgment, but that "the authority to remit is limited only by the payment of the money to the collector for distribution." So Mr. Justice Thompson also says: "*If the government refuse to adopt his* [the informer's] *acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates.*" Whence I infer that the Supreme Court believed that if the government *did adopt* his acts, and did *not* waive the forfeiture, nor repudiate his proceedings, but, on the contrary, reaped a great and direct benefit from them, that then and in such a case the informer would be entitled to recover his share of that which the government received by and through the adoption of his acts, and the proceedings upon his information.

In the case now at bar, there was an action instituted by the government upon and as the direct consequence of the collector's proceedings. Whether that action was prosecuted to judgment and the money was paid for distribution upon the judgment, or whether it was ended by compromise and the money was paid for distribution under the compromise, I deem to be immaterial. Whether that action was rightfully brought and the government might have recovered ultimately if it had proceeded, or whether it was brought wrongfully and the defendants, to be rid of it, paid their money voluntarily and foolishly, I also deem to be immaterial. The only question for me to consider, in my opinion, is whether the money received was the fruit of the action. The petition very clearly shows that it was. No other action or proceeding was pending against Rhomberg to which the compromise could be extended; no other information had been given which could be deemed the basis, in whole or in part, for that action. Through the proceedings of the collector the government received a large sum; without the proceedings of the collector it would have received nothing. The money was the avails of the action, and the action was to enforce the forfeiture. If any further circumstance were needed to establish this, it is found in the fact that the suit was not discontinued first and the taxes paid afterward; nor were the taxes paid voluntarily and the suit discontinued afterward; but the money paid was exacted by the suit, and by it alone, and the consideration which the government gave for this money so paid was not a receipt for taxes, but a relinquishment of the property which was held for forfeiture.

It was thought by the Secretary of the Treasury that the government had a lien upon the property for its unpaid taxes. That might be so; yet it is most certain that the action in the district court was never instituted to enforce that lien. That was an action in which the government and the collector were jointly and equally interested, brought to recover property which the law declared forfeited for the fraud confessed of the manufacturer.. Whatever was received through and in consideration of its discontinuance, was received for the use and benefit of the parties jointly interested, and was to be

divided and apportioned as the law determines the extent of their respective interests. If the suit had been discontinued, and the agreed forfeiture paid, and the property given up to the defendants, and if the government had then proceeded with knowledge acquired through the informer's discoveries to enforce its lien for taxes by another proceeding, then it might be held correctly that the informer's rights were gone. But when the government never trusted the defendant for an hour, nor gave up possession of the property until the money was paid, but used the suit brought on the claimant's information as its only engine for coercing payment, how can we call that a payment of taxes which was in fact a consideration given for the discontinuance of a suit and the surrender of property seized, and subject, or supposed to be subject, to forfeiture?

It is also thought by a majority of my brethren that the power given to the Commissioner, by the 44th section, "*to compromise all suits relating to internal revenue*," gave to him a new power over the rights of the collector, and an authority to distribute the proceeds of the suit in a manner different from that which the law had previously determined. This word "compromise" has a common and well known signification, and always imports a mutual concession; but it must be, as I think, a concession between the parties to the "*suit*."

Now here we have a proceeding in which the government is the plaintiff, and the owner of certain property is the defendant. The "compromise" referred to is a settlement between these parties, and not between the plaintiff and third persons, strangers to the record. The statute speaks of a "compromise" of the "*suit*" and not of a right or claim growing out of the seizure, and relating solely to one who is no party to the "suit." It was no concern of the defendant what was to be done with the money which he paid to be clear of his own wrongful acts. All that he was interested in was in recovering back the property against which the suit was brought. There could be no compromise where there was no controversy. As between the claimants and the government there was no controversy, for they were interested only in the forfeiture or its avails; and as to them, the law determined how they should be apportioned. To extend the signification of this word, so far as to infer from it a power in the Secretary to compromise more than the "*suit*," and an authority to reapportion the avails in a manner different from that which the law had already done, or which a court might do, if the proceeding went to judgment, seems to me to be carrying the meaning of the word beyond the bounds of fair construction, and beyond the intent and policy of the law.

There is, as I understand the facts, no doubt but that the claimants would have been entitled to the moiety of this sum of $195,102, if the Secretary had not called it by the name of taxes. All that there was of the compromise was that the owners paid $220,102, and received back their property, worth $350,000, with a discontinuance of the suit. As to the imaginary parts of which this sum of $220,102 was composed, it rested entirely within the breast of the Secretary to say what they should be. He had indeed determined within his

own mind that the compromise should consist in his receiving a sum equal to the taxes on a part of the property, and another sum, fixed arbitrarily, which he called the forfeiture. If, after the money had been paid, he had reconsidered his determination, and called the $195,102 forfeiture instead of taxes, the claimants would have been entitled to one-half of this, and the defendant in the other suit would have been neither injured nor affected; and if, on the contrary, he had reconsidered his determination, and called the $25,000 taxes on some other portion of the property relinquished, the claimants would have been entitled to nothing, and the defendant in the other suit would have been neither benefited nor affected. Now the plain English of this is, that the Secretary had not only a power to compromise the suit, but an absolute right of distribution over the proceeds. The record indicates, and I understand the fact to be, that no express or stipulated compromise was ever entered into between the government and the owners, which provided for or affected the distribution of the moneys received. A bond was indeed given upon the release of the property for the costs, taxes, and $25,000 in lieu of penalties; but the $25,000 in lieu of penalties was not to be paid as a separate and distinct sum; and on the contrary, the bond was conditioned for the payment of three instalments, "$50,000 *in one month, and the balance in two equal payments, one-half in three months, and the other in five months.*" This was equivalent to the payment of a sum in gross, and made the $195,102, called taxes, as completely a part of the sum "*reserved by the government out of the forfeiture*" as the $25,000 called "*in lieu of penalty;*" and "*whatever is reserved by the government out of the forfeiture,*" says the Supreme Court "*is reserved as well for the seizing officer as for itself.*"—(*M'Lane vs. The United States, p.* 426.

The conclusions to which I have come are these:

1. The sum of $220,102 was, in the language of the Supreme Court, "*a gross sum*" reserved by the government "*out of the forfeiture as a condition of the remission,*" (6 Peters, 427;) and calling it money received for taxes could not alter its character, nor impair the collector's rights.

2. The government and the collector were in effect partners in the enterprise; the government had a controlling right to abandon the adventure, but had no right to remit its partner's share and retain its own, nor to apply, upon an individual indebtedness, moneys received through the joint enterprise.

3. The 44th section of the internal revenue act 30th June, 1864, authorized the Commissioner of Internal Revenue to compromise with the owners of the forfeited property, but did not authorize him to compromise with the collector. The moneys received from such a compromise, and in consideration of a release of the forfeited property were, in legal effect, moneys reserved from the forfeiture and the fruit of an action, in which the collector was jointly and equally interested with the government.

4. The acts of the collector in the case at bar came within the general policy of the United States; which is, that whenever the

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government adopts the acts of the informer, and proceeds upon his discoveries and to his risk, it will share equally with him whatever may be received through his proceedings; which policy has never been departed from since the establishment of this government, and has been clearly indicated by its statutes, and solemnly and repeatedly pronounced by its highest judicial tribunal.

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